00078608

348.04
Far/Rep
78608

NOT TO BE ISSUED
OUT OF THE LIBRARY.

BOMBAY BRANCH
OF THE
ROYAL ASIATIC SOCIETY
TOWN HALL, BOMBAY.

Digitized with financial assistance from
Government of Maharashtra
on 30 January, 2020

NAMES OF REPORTERS.

Original Civil Jurisdiction.

CHARLES F. FARRAN, B.A., Barrister-at-Law.

78608

Appellate Civil Jurisdiction.

KHANDERA'V CHIMANRA'V BEDA'RKAR, B.A., LL.B.

KHARSHEDJI RUSTAMJI THA'NA'VA'LA'.

MAHA'DEV GOVIND RA'NA'DE, M.A., LL.B.

Crown Cases.

CHARLES F. FARRAN, B.A., Barrister-at-Law.

KHANDERA'V CHIMANRA'V BEDA'RKAR, B.A., LL.B.

KHARSHEDJI RUSTAMJI THA'NA'VA'L'A.

MAHA'DEV GOVIND RA'NA'DE, M.A., LL.B.

00078608

ERRATA, CORRIGENDA, ET ADDENDA.

Page		
15	O.C.J.	Line 17 from bottom of page, *for* "Dabree" *read* "Dabee."
16	,,	In note (*i*), *for* "124" *read* "126."
,,	,,	Line 14 from top of page, *for* "copartners" *read* "coparceners."
17	,,	In note, *after* "Sengamalathammal" *add* "*v.*"
26	,,	Line 12 from bottom of page, *place* words "defendant's firm" in brackets.
40	,,	Line 15 from top of page, *after* "2 Ind. Jur." *add* "N. S."
44	,,	In note (*a*), *before* "Ind. Jur." *insert* "I."
46	,,	Line 17 from top of page, *omit* "they."
56	,,	In note (*c*), *for* "90 Q. B. 103" *read* "9 Q. B. 1030."
59	,,	Line 15 from bottom of page, *for* "Dunbar" *read* "Mayhew."
70	,,	At the bottom of page, *for* "Prescott" *read* "Prescot."
96	,,	Line 15 from top of page, *for* "named" *read* "framed."
98	,,	Line 3 from bottom of page *for* "J. T. White" *read* "J. S. White."
121	,,	Line 19 from bottom of page, *for* "s. 295" *read* "s. 26."
4	A.C.J.	Line 7 from bottom of page, *for* "37" *read* "38."
5	,,	Line 17 from bottom of page, *after* "Shek Golam Sing" *add* "v. Burra Sing (*b*)."
,,	,,	Line 14 from bottom of page, *for* "Chalakondra Chalakonda" *read* "Chalakonda v. Chalakonda."
,,	,,	Line 10 from bottom of page, *for* "Bhine" *read* "Bhive."
16	,,	Line 16 from bottom of page, *for* "July" *read* "June," and similarly *correct* "July" at line 10 from bottom of page.
26	,,	Line 17 from top of page, *for* "sec. 8" *read* "sec. 7."
,,	,,	Line 4 from bottom of page, *for* "289" *read* "298."
30	,,	In note (*c*), *for* "T. C." *read* "S. C."
38	,,	In note, *for* "No. 45" *read* "page 45."
40	,,	Line 5 from bottom of page, *after* "Puresh Narain Roy" *add* "v. Dalrymple."
110	,,	Line 17 from top of page, *for* "thy" *read* "the."
,,	,,	Line 18 from top of page, *for* "thee" *read* "they."

Page		
118	A.C.J.	The note, *for* "239" *read* "293."
126	„	Line 7 from bottom of page, *for* "Hurvath Roy" *read* "Huronath Roy."
147	„	Line 15 from bottom of page, *for* "Tulajarm" *read* "Tuljaram."
180	„	In note (c), *for* "I. Moo. Ind. App. 485" *read* "3 Moo. Ind. App. 278."
183	„	In headnote *for* "nidhan" *read* "nirdhan."
202	„	In note (*d*), *for* "544" *read* "554."
203	„	In second line of note, *for* "rom" *read* "from."
209	„	Line 5 from bottom of page, *dele* "suits or."
218	„	In note (*p*), *before* "Calc. W. Rep." *insert* "11."
238	„	In line 2 from bottom of headnote, *for* "cancel" *read* "barred," and *after* "Reg. V. of 1827" *insert* "or."
240	„	Line 6 from bottom of page, *for* "Gudhur Rushotuna" *read* "Girdhur Purshotum."
241	„	In catchwords, *for* "such" *read* "sued"
256	„	Line 10 from bottom of page, *for* "Act X. of 1857" *read* "Act X. of 1857."
260	„	Line 5 from top of page, *for* "(*e*)" *read* "(*f*)."
262	„	In note, *for* "Keshon" *read* "Keshor."
11	CR. CA.	In note, *for* "17 Ad. & E." *read* "17 Q. B."
38	„	Lines 14 and 15 from bottom of page, *for* "ceremoneys" *read* "ceremonics."
40	„	Line 15 from bottom of page, *for* "I may be" *read* "It may be."
47	„	Line 3 from bottom of page, *for* "The trial it" *read* "The trial is."
58	„	In note (*b*), *for* "55," *read* "555."
79	„	Line 8 from bottom of page, *after* "adultery" *insert* a bracket.

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

		Page
Abraham, R. J., *In re*	A.C.J.	170
Ábubekar bin Hagáḍá Hajisábá, *v.* Máibibi and Sidi Sáheb	A.C.J.	77
Ahmed valad Nanhubhái *v.* Khásáji valad Karimbhái	A.C.J.	149
Anpurṇábái *v.* Sakhárám Jagannáth	A.C.J.	256
Appá valad Káshináth *v.* Viṭhobá valad Tukárám	A.C.J.	88
Bábáji Jiváji *v.* Bhágirthibái	A.C.J.	70
Bagubái *v.* Kázi Sayad Nizmuddin *et al.*	A.C.J.	205
Bái Manchhá *v.* Narotamdás Káshidás *et al.*	A.C.J.	1
Bakatrám Badrináth, *In the matter of the petition of*	O.C.J.	131
Báláji Maháḍev *v.* Krishṇáji bin Chimṇáji *et al.*	A.C.J.	95
Báláji Támáji Pothár *et al. v.* Tamangouḍá bin Ghanasyámgouḍá.	A.C.J.	97
Balvantráv Bháskar *v.* Bayábái *et al.*	O.C.J.	83
Bápuji Balvant *v.* Raghunáth Viṭhal	A.C.J.	72
Bhándu valad Rájárám *v.* Dámáji valad Jiváji	A.C.J.	59
Bháskar Trimbak Achárya *v.* Maháḍev Rámji *et al.*	O.C.J.	1
Bholágir Gurú Mángir *v.* Hormasji Sorábji	A.C.J.	80
Bisandás valad Magnirám *et al. v.* Lakhmichand Kisanchand.	A.C.J.	159
Blackwell and Co. *v.* Sumár Ahmed	O.C.J.	88
Bombay, Baroda, and Central India Railway Company *v.* Tápidás Govindbhái	A.C.J.	116
Bombay Joint Stock Corporation *In re* the Sheriff of Bombay.	O.C.J.	22
Chintáman Náráyan *v.* Mádhavráv Venkṭesh	A.C.J.	29
Dádá valad Valli *v.* Bávásháh valad Kásam	A.C.J.	9
Dájibá Anandráv *v.* The B. B. & C. I. Railway Company	A.C.J.	235
Dastur Husang Jámásji *v.* R. L. Fell	CR.CA.	30
Davaltrám Shrirám *et al. v.* Bulákidás Khemchand	O.C.J.	24
Dhoṇḍibá Lakshuman *v.* Kusá	A.C.J.	219

		Page
Ganesh Pándurang Agte *v.* Gangádhar Rámkrishna	A.C.J.	244
Ganpat Máṇikji Pátíl, *In re*	O.C.J.	64
George Lewis, *In re*	O.C.J.	42
Gordhandás Girdharbhái *v.* Pránkor	A C.J.	263
Govind Purshotam *v.* The Sub-Collector and Deputy Conservator of Forests of Colaba	A.C.J.	188
Govind Vináyak Gadre *v.* The Collector of Ratnágirí	A.C.J.	101
Hari bin Joti *v.* Náráyaṇ Achárya	A.C.J.	23
Hari Vishṇu *v.* Gopál bin Rágji *et al.*	A.C.J.	181
Hayátkhá *v.* Abdulákhá	A.C.J.	151
Hodgson *et al. v.* Rupchand Hazárimal	O.C.J.	39
Hongkong and Shanghái Banking Corporation *v.* T. Baker	O.C.J.	71
Hormasji Sorábji *et al. v.* Bholágir Gurú Mángir	A.C.J.	80
Jamiyatrám Himmatrám *v.* The Gujarát Trading Company	A.C.J.	185
Jeṭhábhái Bháichand *v.* Bái Lakhu	A.C.J.	27
Káshidás Govindbhái *v.* The B. B. and C. I. Railway Company.	A.C.J.	114
Káshináth Sitárám Oze *v.* Dádki *et al.*	A.C.J.	211
Kázi Gulám Alli bin Kási Ismáil *v.* H. H. Agá Khán	O.C.J.	93
Krishṇabhaṭ bin Hirágange *v.* Kappábhaṭ bin Mahálbhaṭ	A.C.J.	137
Krishṇá Pádhe, *Ex parte*	A.C.J.	50
Krishṇáppá valad Santá *v.* Panchappá valad Gurpadáppá *et al.*	A.C.J.	258
Kuvarji Premchand *et al. v.* Bái Javer	A.C.J.	143
Lachhaman Johárimal *v.* Bápu Khandu *et al.*	A.C.J.	241
Lachirám Jayasangji *v.* Rámji bin Shiváji	A.C.J.	107
Láḍo Lakshuman *v.* Krishṇáji Sadáshiv *et al.*	A.C.J.	41
Lakshmibái *v.* Jayarám Hari *et al.*	A.C.J.	152
Lakshuman Rámji *v.* Rámlál valad Mahipati	A.C.J.	66
Lakshuman Sakhárám *v.* Ráṇu bin Sidoji *et al.*	A.C.J.	51
Lálji Vaijnáth *v.* Rávji Abáji	A.C.J.	136
Maháshankar Harishankar *v.* Valibhái Umanji *et al.*	A.C.J.	174
Malhári valad Rághoji *v.* Tukárám valad Dárkoji	A.C.J.	86
Mancharji Sorábji Chullá *v.* Kongscoo *et al.*	O.C.J.	59
Manchhárám Kalliándás *v.* Baksho Sáheb Mir Mainudin Khán	A.C.J.	231
Manchhárám Kalliándás *v.* Ratilál Lálshankar	A.C.J.	39
Mathurádás Jagjivandás *v.* Náthá Bájá *et al.*	A.C.J.	131
Melgiráppá bin Solbáppá Teli *v.* Shiváppá bin Eráppá	A.C.J.	270
Motoji bin Ratnáji *v.* Shekh Husen	A.C.J.	8
Muhammad Yusuf *v.* Peninsula and Oriental Steam Navigation Company	O.C.J.	98
Murár Dáya *et al. v.* Nágriá Ganeshiá	A.C.J.	17

		Page
Nánábhái Narotamdás *v.* Rámsheṭ Govindsheṭ	A.C.J.	156
Nánábhái Rustamji *v.* Pestanji Jamsetji	A.C.J.	31
Nandrám Sardármal *v.* Bhaváni Haibati *et al.*	A.C.J.	241
Nandvallabh *v.* Allibhái Isyágani	A.C.J.	254
Náráyaṇ bin Rághoji *v.* Bholágir Gurú Mángir	A.C.J.	80
Narotamdás Bhagtándas *v.* Dayábhái Ichháchand	A.C.J.	34
Narsáppá Lingáppa *et al. v.* Sakhárám Krishṇa	A.C.J.	215
Nilowa *v.* Fakiráppá	A.C.J.	75
Pánámchand valad Surajmal *v.* Bhivráj valad Dashrat	A.C.J.	38
Pánḍurang Govind *v.* Bálkrishṇa Hari	A.C.J.	125
Pánḍurang Sadáshiv *v.* Moro Vásudev	A.C.J.	68
Parshotam Manchhárám *v.* Mirzá Abdul Latíf Khán	O.C.J.	67
Persia, The, *In re*	O.C.J.	138
Poli, widow, *v.* Narotam Bápu *et al.*	A.C.J.	183
Raghubhái Rámchandra, *In the matter of*	O.C.J.	86
Ráiji Manor *et al. v.* Desái Kalliánrái Hukmatrái	A.C.J.	56
Rámchandra Raghunáth *v.* Abáji bin Rástyá	A.C.J.	12
Rámkuvarbái *v.* Dámodhar Narbherám	A.C.J.	146
Rámráv Khanḍeráv *v.* Govind Panḍsheṭ *et al.*	A.C.J.	63
Rámsheṭ bin [illegible]shoṭ *v.* Bálkrishṇa bin Abábhaṭ	A.C.J.	161
Ráṇu valad Áváji Máli *v.* Ramábái	A.C.J.	265
Rasáji bin Davláji *v.* Sayánú bin Sagdu *et al.*	A.C.J.	7
Ratanchand Shrichand *v.* Hanmantráv Shivbakas	A.C.J.	166
Reg. *v.* Bháishankar Narbherám	CR.CA.	75
Reg. *v.* Dixon	CR.CA.	14
Reg. *v.* Gangárám Málji	CR.CA.	43
Reg. *v.* Gaṇu bin Dhároji	CR.CA.	57
Reg. *v.* Girdhar Dharamdás	CR.CA.	33
Reg. *v.* Govindás Haridás	CR.CA.	76
Reg. *v.* Jaili Bháviṇ	CR.CA.	60
Reg. *v.* Jivanji Limji	CR.CA.	1
Reg. *v.* John Connon	CR.CA.	15
Reg. *v.* Kálá Karsan *et al.*	CR.CA.	55
Reg. *v.* Keshavsheṭ *et al.*	CR.CA.	74
Reg. *v.* Khatábái	CR.CA.	9
Reg. *v.* Malhári Lavji	CR.CA.	45
Reg. *v.* Mehervánji Bejanji	CR.CA.	6
Reg. *v.* Muhammad Khán valad Imám Khán	CR.CA.	54
Reg. *v.* Nantamrám Uttamrám	CR.CA.	64
Reg. *v.* Rámchandra Eknáth *et al.*	CR.CA.	36

		Page
Reg. *v.* Rámswámi Mudliár	CR.CA.	47
Reg. *v.* Shankar Abáji Hoshing	CR.CA.	69
Reg. *v.* Shekh Miyá valad Dáud	CR.CA.	10
Sakho Náráyaṇ Khaṇḍálkar *v.* Náráyaṇ Bhikáji Khaṇḍálkar.	A.C.J.	238
Sayad Miyá Gulám Nabi *et al.* *v.* Kharanbibí	A.C.J.	177
Sayad Valimiá Alimiá *et al.* *v.* Gulám Kádar Mohidin	A.C.J.	25
Shivrám Viṭhal *v.* Bhágirthibái	A.C.J.	20
Shivrudráppá *v.* Káshináth Vishṇu	A.C.J.	141
Shridhar Vináyak *v.* Bábáji bin Jiváji	A.C.J.	220
Sitárám Amrit *et al.* *v.* Bhagvant Jagannáth *et al.*	A.C.J.	109
Sitárámbhaṭ *et al.* *v.* Sitárám Gaṇesh *et al.*	A.C.J.	250
Sitárám Daṇḍekar *v.* Gaṇesh Gokhle	A.C.J.	121
Tápidás Govindbhái *v.* The Bombay, Baroda, and Central India Railway Company	A.C.J.	116
Thomas Shortt *et al.* *v.* Abdul Rahimán	O.C.J.	53
Tukárám Ambáidás *v.* Rámchandra valad Bhimanná Dhugi.	A.C.J.	247
Tukárám Viṭhoji *v.* Khaṇḍoji Malhárji	O.C.J.	134
Tvátat Svámi Gurú Tvátat Svámi *v.* Andánya Charanti Gurú Tvátat Svámi *et al.*	A.C.J.	132
Uttamrám Máṇikrám *v.* Girdharlál Motirám	A.C.J.	45
Vaku valad Rám Pátíl *v.* Pánd valad Máliji Pátíl *et al.*	A.C.J.	243
Váman Jan[illegible]rdan *v.* The Collector of Tháṇá	A.C.J.	191
Vináyak Náráyaṇ Jog *v.* Govindráv Chintáman Jog	A.C.J.	224
Viṭhal Mahádev *et al.* *v.* Dáud valad Muhammad Huson *et al.*	A.C.J.	90
Viṭhobá Bává *v.* Haribá Bává	A.C.J.	54

A TABLE

OF THE

NUMBERS AND DESCRIPTION OF CASES REPORTED

IN THIS VOLUME.

	Page
I. Original Suits (10).	
No. 638 of 1867 ..... O.C.J.	98
„ 553 of 1868 ..... O.C.J.	24
„ 595 „ ..... O.C.J.	1
„ 818 „ ..... O.C.J.	59
„ 840 „ ..... O.C.J.	39
„ 22 of 1869 ..... O.C.J.	67
„ 169 „ ..... O.C.J.	71
„ 274 „ ..... O.C.J.	83
„ 376 „ ..... O.C.J.	134
Admiralty Suit ..... O.C.J.	138
II. Appeal from Original Jurisdiction (1).	
No. 153 ..... O.C.J.	93
III. Regular Appeals (5).	
No. 9 of 1868 ..... A.C.J.	191
„ 10 „ ..... A.C.J.	59
„ 11 „ ..... A.C.J.	101
„ 12 „ ..... A.C.J.	224
Regular Appeal No. 1 of 1868 under Act X. of 1866 ..... A.C.J.	185
IV. Special Appeals (56).	
No. 629 of 1867 ..... A.C.J.	34
„ 690 „ ..... A.C.J.	41
„ 156 of 1868 ..... A.C.J.	146
„ 329 „ ..... A.C.J.	132
„ 366 „ ..... A.C.J.	1
„ 403 „ ..... A.C.J.	137
„ 419 „ ..... A.C.J.	12
„ 443 „ ..... A.C.J.	70
„ 468 „ ..... A.C.J.	68
„ 470 „ ..... A.C.J.	20
„ 473 „ ..... A.C.J.	77
„ 480 „ ..... A.C.J.	17
„ 534 „ ..... A.C.J.	23
„ 536 „ ..... A.C.J.	9
„ 552 „ ..... A.C.J.	56
„ 582 „ ..... A.C.J.	161
„ 589 „ ..... A.C.J.	80
„ 597 „ ..... A.C.J.	80
„ 602 „ ..... A.C.J.	80
„ 605 „ ..... A.C.J.	63
„ 624 „ ..... A.C.J.	54
„ 633 „ ..... A.C.J.	25
„ 635 „ ..... A.C.J.	31
„ 12 of 1869 ..... A.C.J.	75
„ 19 „ ..... A.C.J.	72
„ 37 „ ..... A.C.J.	258
„ 53 „ ..... A.C.J.	66

		Page
No. 62 of 1869	A.C.J.	121
„ 64 „	A.C.J.	86
„ 65 „	A.C.J.	88
„ 74 „	A.C.J.	116
„ 81 „	A.C.J.	114
„ 82 „	A.C.J.	90
„ 84 „	A.C.J.	116
„ 93 „	A.C.J.	97
„ 117 „	A.C.J.	125
„ 146 „	A.C.J.	215
„ 206 „	A.C.J.	235
„ 218 „	A.C.J.	149
„ 226 „	A.C.J.	152
„ 252 „	A.C.J.	143
„ 256 „	A.C.J.	156
„ 274 „	A.C.J.	177
„ 295 „	A.C.J.	188
„ 298 „	A.C.J.	183
„ 305 „	A.C.J.	265
„ 326 „	A.C.J.	211
„ 330 „	A.C.J.	238
„ 342 „	A.C.J.	263
„ 354 „	A.C.J.	220
„ 368 „	A.C.J.	250
„ 371 „	A.C.J.	270
„ 379 „	A.C.J.	244
„ 396 „	A.C.J.	254
„ 404 „	A C.J.	247
„ 412 „	A.C.J.	243

V. Referred Civil Cases (18).

Jan., 19, 1869	A.C.J.	7
„ „ „	A.C.J.	8
Feb., 16	A.C.J.	27
Mar.,	A.C.J.	51
	O.C.J.	53
	A.C.J.	95
	A.C.J.	107
	A.C.J.	109
	A.C.J.	131
	A.C.J.	136

		Page
July, 6, 1869	A.C.J.	141
Aug., 17 „	A.C.J.	151
Sept., 7 „	A.C.J.	159
„ „ „	A.C.J.	256
Oct., 7 „	O.C.J.	88
„ „ „	A.C.J.	219
Nov., 30 „	A.C.J.	231
Dec., 7 „	A.C.J.	241

VI. Civil Petitions (12).

Jan., 7, 1869	A.C.J.	38
„ 21 „	A.C.J.	39
„ „ „	A.C.J.	181
Feb., 18 „	A.C.J.	29
Mar., 4 „	A.C.J.	45
„ „ „	A.C.J.	50
Aug., 2 „	O.C.J.	64
„ 10 „	O.C.J.	131
„ 25 „	A.C.J.	166
„ 26 „	A.C.J.	170
Sept., 2 „	A.C.J.	174
„ 22 „	A.C.J.	205

VII. Criminal Appeals (8).

Mar., 24, 1869	CR.CA.	10
June, 24 „	CR.CA.	43
Aug., 18 „	CR.CA.	47
„ 26 „	CR.CA.	54
Sept., 22 „	CR.CA.	57
„ 23 „	CR.CA.	55
„ 27 „	CR.CA.	60
„ 29 „	CR.CA.	64

VIII. Referred Criminal Cases (7).

Feb., 11, 1869	CR.CA.	1
„ „ „	CR.CA.	6
Mar., 4 „	CR.CA.	9
„ 5 „	CR.CA.	33

	Page
Apr., 1, 1869 .....CR.CA.	14
Dec., 1 „ .....CR.CA.	74
„ 2 „ .....CR.CA.	75

IX. Criminal Reviews (3).

April, 21, 1869 .....CR.CA.	30
„ „ „ .....CR.CA.	36
June, 24 „ .....CR.CA.	45

	Page

X. Miscellaneous Cases (6).

Jan., 28, 1869 .....O.C.J.	42
Feb., 11 „ .....O.C.J.	22
Apr., 12 „ .....CR.CA.	15
Sept., 13 „ .....O.C.J.	86
Oct., 6 „ .....CR.CA.	69
Dec., 11 „ .....CR CA.	76

CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION.

OF THE

HIGH COURT OF BOMBAY.

Original Suit No. 595 *of* 1868.

1869.
Jan. 7.

BHA'SKAR TRIMBAK ACHA'RYA ..... *Plaintiff.*

MAHADEV RA'MJI, HIRU, PUSU LAKSHUMAN, PRA'NJIVANDA'S MATHURA'DA'S, MUSSA' ABDUL, NASARVA'NJI MEHERVA'NJI, and THE ADVOCATE GENERAL ..... *Defendants.*

Hindú Law—Widow's power to dispose of Immoveable Property inherited from her husband, limited—Religious uses—Dharm, Gift in—Krishnárpan, Gift in—Sister's Estate as Heir to her Brother—Stridhan—Inheritance.

A Hindú widow who has inherited immoveable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose by a gift in *Dharm* or *Krishnárpan* of the whole of such immoveable property without the consent of the heirs of her husband.

A sister on this side of India, taking as heir to her brother, takes his property as *stridhan* with an absolute power of disposition over it; and such property upon her death passes in the first instance to her daughters. The sons of such sister have not a vested interest in it as coparceners with their mother.

Property acquired by a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as *stridhan*, and descends accordingly.

THE facts of this case fully appear from the judgment of the Court. The suit was tried by ARNOULD, J., in December 1868, and occupied several days.

White and *Dunbar* for the plaintiff.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI. *et. al.*

Marriott (with him *Pigot*) for the first defendant.

Taylor and *Farran* for the fourth defendant.

Macpherson for the Advocate General.

The other defendants appeared in person.

Cur. adv. vult.

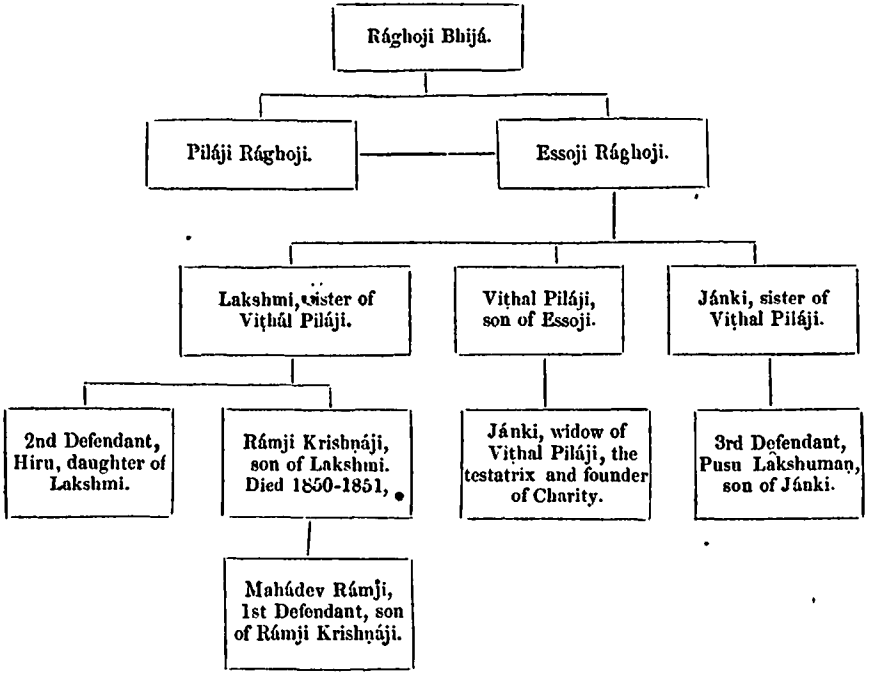
Jan. 7—ARNOULD J.—In this suit the plaintiff, who stated in evidence that his proper style was that of *Upádhiá*, or hereditary priest, of the family of Viṭhal Piláji having hereditary charge of the temple of Shri Viṭhobá Rakhmái in Mugbhát *oart*, seeks for a declaration that a certain portion of Mugbhát *oart*, and a certain house, No. 167, Novroji Hill, with the rent and profits thereof, were well devised by Jánki, the widow of the said Viṭhal Piláji, to religious and charitable purposes. He also seeks that a certain mortgage executed in October 1865, of the Novroji Hill house to the fourth defendant, Práṇjivandás Máthurádás, a mortgage of the 7th April 1867 of a portion, (550 square yards) of Mugbhát *oart*, to the fifth defendant, Mussá Abdul Rahim, and an alleged sale of the last mentioned portion on the 8th of June 1868, to the sixth defendant, Nasarvánji Mehervánji, should respectively be declared invalid; he further seeks for a declaration that he, the plaintiff, is entitled to the possession and enjoyment of that part of Mugbhát *oart* in which the temple stands, and of the house (No. 167) on Novroji Hill, and of the rents and profits of both, subject to the obligation of maintaining the temple and worship of Shri Viṭhobá Rakhmái. The plaintiff also seeks other descriptions of relief which it is not material to consider.

In dealing with this case the more convenient course will be first to state the facts as they result from the evidence; 2ndly, to consider the questions of law arising on the facts as found; and then, 3rdly, to apply the conclusions of facts and law arrived at to the issues as originally framed and as subsequently in some respects modified by the Court.

The first point is to ascertain the pedigree of the family of Viṭhal Piláji, the husband of Jánki the widow, by whom the

temple and charity were founded, and the state of that family at the period of Jánki's death.

The following is the pedigree as far as we are concerned with it, in this case:—


Rághoji Bhijá.
Piláji Rághoji.
Essoji Rághoji.
Lakshmi, sister of Viṭhál Piláji.
Viṭhal Piláji, son of Essoji.
Jánki, sister of Viṭhal Piláji.
2nd Defendant, Hiru, daughter of Lakshmi.
Rámji Krishṇáji, son of Lakshmi. Died 1850-1851,
Jánki, widow of Viṭhal Piláji, the testatrix and founder of Charity.
3rd Defendant, Pusu Lakshumaṇ, son of Jánki.
Mahádev Rámji, 1st Defendant, son of Rámji Krishṇáji.

Of Rághoji Bhijá, the root of the family, nothing was known to any of the witnesses in the case, and not much of his two sons, Piláji and Essoji, except that Piláji, the elder, who had no issue, survived Essoji; and that Essoji, who died first, left issue one son, Viṭhal, called after his uncle Viṭhal Piláji, and two daughters, Jánki the mother of Pusu Lakshumaṇ, the third defendant, and Lakshmi the mother of Hiru, the second defendant, and the paternal grandmother through her deceased son, Rámji Krishṇaji, of Mahádev Rámji, the first defendant.

As there is no evidence to show that Piláji and Essoji were divided, the usual presumption must prevail, and it must be held that they lived and died undivided. There was some vague and very uncertain evidence given as to

1869.

BHASKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI. *et. al.*

Vithal Piláji having been adopted by his uncle Piláji Rághoji, evidence chiefly resting on his having been called Vithal Piláji after the name of his uncle, not Vithal Essoji after the name of his father; but, apart from the difficulty arising from the general rule of Hindú law, that an only son, such as Vithal was, cannot be the subject of adoption, a rule recently re-affirmed and illustrated in a judgment of a Division Court of the Calcutta High Court consisting of *L. S. Jackson* and *Dwarkanath Mitter*, J.J.: *Rajah Opendur Lall Roy* v. *Ranee Bromo Moyee* (*a*); apart also from the consideration that any adoption of Vithal by Piláji is not made out by the evidence, the result of the evidence I take to be this, that Vithal, on the death of Pilaji, succeeded to the property as sole surviving male member of an undivided Hindú family.

The family was of the *Koli* (or fisherman) caste, and the property to which Vithal succeeded consisted, first, of a large *oart* called Mugbhát, in the district of Fanaswádi; secondly of a house No. 167, on Novroji Hill, the family house; thirdly of certain fishing boats in Chinch Bunder and certain fishing stakes in the harbour.

Vithal died without issue about the year 1836, leaving two widows, both named Jánki—Jánki the elder and Jánki the younger. Jánki the elder lived only a few years after him; and in June 1840 Jánki the younger, as sole surviving widow, obtained letters of administration of his estate and effects.

Jánki, then, must be taken as having, at all events since 1840, the status of a sole surviving widow of a childless separated Hindú who had died the owner of ancestral immoveable property, and she must be taken as having had such rights of disposition and control over her late husband's property as are accorded by Hindú law to a widow so situated, and no other or different rights.

Jánki continued to live in the family house, No. 167, on Novroji Hill, and herself during the residue of her life col-

(a) 10 Calc. W. Rep., Civ. R. 347.

lected the rents of such portion of it as was let to tenants. Lakshmi, the sister of her late husband, Vithal, and who had been also for some time a widow, assisted Jánki in the management of the fishing-boats at Chinch Bunder, and the fishing stakes in the harbour; and one Sadobá Yesobá, a Bhandári by caste, collected for Jánki the rents and profits accruing from the *kadján* huts and toddy trees then standing in Mugbhát *oart*.

Jánki, who had, it seems, previously sold a portion of Mugbhát *oart* on the 17th of January 1848, made a Will in English, at the office of Mr. Ayrton, (now M. P. for the Tower Hamlets and one of the joint Secretaries of the Treasury in Mr. Gladstone's administration, but then a Solicitor in Bombay). By this Will, after making certain bequests and legacies, amongst others a portion of Mugbhát *oart* to Sadobá Yesobá, Rs. 500 to Lakshmi, for the care she had taken of her fishing-boats and stakes, Jánki directs that half the residue of Mugbhát *oart* shall be sold and a portion of the proceeds of such sale be applied in building a temple to Shri Vithobá Rakhmái on the half of the residue of the *oart* that remains unsold; that such temple, when built shall be placed in the care of Bháskar Trimbak Achárya (the plaintiff in the present suit), and that the rents and profits of the unsold half of the *oart* and of the house, No. 167, on Novroji Hill, shall be applied in keeping the said temple and premises in proper repair and in supplying the said Bháskar Trimbak Achárya and his successors with a proper maintenance and provisions and with flowers and all things required for the daily *pujá* of Shri Vithobá Rakhmái, and all other things required for the said temple and images. Of this Will, Jánki appointed Sadobá Yesobá executor.

On the 23rd of November of the same year, 1848, Jánki duly executed a codicil to her said Will, by which she ratified and confirmed the same but appointed Lakshmi, the sister of her late husband Vithal Piláji, co-executrix with Sadobá Yesobá and joint manager with him of the estate mentioned in the Will as directed (so runs the language of the codicil) to the charity purposes.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI. et. al.

On the day the codicil was executed, Jánki, being then sick but in perfectly sound mind, performed at the family house, No. 167, on Novroji Hill, with the assistance and the full assent of Laskhmi the religious ceremony called *sankalpa* and made a gift in *krishṇárpaṇ* of all the property devised to charity purposes in the Will of the 17th of January 1848.

The nature of the ceremony, and the circumstances attending it, are fully described in the evidence of the plaintiff, and also in that of another eye-witness, Narsi Kattu, a highly respectable and wealthy member of the Bháthiá caste formerly in partnership with the late Gokaldás Tejpál. From the evidence of the latter witness I take the following passage;—"Lakshmi brought water and *tulsi* leaves and handed them to Jánki; Bháskar (the plaintiff,) recited the incantation of *krishṇárpaṇ*, and Jánki repeating the words *krishṇarpaṇ* poured the water into the Bráhman's hand, by which ceremony the Mugbhát *oart* and the Novroji Hill house were given in *dharm*." Jánki said: "This, my dwelling-house and the Mugbhát *oart* I give in charity; and as for that *oart*, half of it should be sold for the endowment of a temple, and a temple should be built out of the proceeds and given to Bháskar; and as to the Novroji Hill house the income of it should also be given to Bháskar," "Lakshmi," adds the witness, "was present throughout the whole ceremony, and did not object, but in words gave her entire consent, saying to Jánki, 'You are quite welcome to give that in charity.'"

To the same effect, as to Lakshmi's co-operation and express consent, Bháskar, the plaintiff, deposed in his cross-examination as follows:—"Lakshmi took part in the *sankalpa* ceremony by bringing water from the well by direction of Jánki, and by handing her the *tulsi* leaf, and by giving her consent in express words. Lakshmi said to Jánki: 'As you express your desire to give in charity I give my consent; do you do so.'" In re-examination the same witness said, "Lakshmi gave her consent in consequence of a request from Jánki asking her to consent."

About a month or so after the execution of the codicil and the performance of the *sankalpa* ceremony, and the gift in *krishṇárpaṇ*, before the close of December 1848, Jánki died.

The rents and profits of the property devised and given in *dharm* were recovered and appropriated to her own use by Jánki until her death. They were then received by Lakshmi and Sadobá Yesobá. It does not appear that any portion of the rents and profits even of Mugbhát *oart* were received by the plaintiff, as *upádhiá* or hereditary priest and manager, until after the completion and dedication of the temple, when he was formally put in possession.

At the death of Jánki the following members of Viṭhal Piláji's family were alive :—His sister, Lakshmi, who had then long been a widow; her daughter, Hiru, the second defendant in this suit, who had been married but whose husband had died in the first year of wedlock; Lakshmi's son Rámji Krishṇáji (born in 1806, and who died in 1850 or 1851); and his son, Mahádev Rámji, the first defendant, who was born about 1838, and who was, therefore, about ten years old at Jánki's death. The other sister of Viṭhal Piláji, who was also called Jánki, had died some years before Jánki his widow (the testatrix), leaving as her sole issue Pusu Lakshumaṇ, the third defendant in the suit.

In February 1849, Lakshmi and Sadobá Yesobá applied for probate of the Will of Jánki. Their application was opposed and a *caveat* entered by certain persons, who set themselves up as next of kin, according to Hindú law, of Viṭhal Piláji, collateral descendants, as they averred, of Rághoji Bhigá.

This opposition was unsuccessful; their *caveat* was dismissed with costs, and probate of Jánki's Will was granted to Lakshmi and Sadobá Yesobá in September 1849.

Lakshmi and Sadobá Yesobá, in execution of the trusts created by the Will, and the gift in *krishṇárpan*, soon after they obtained probate (apparently in the course of the year 1850), proceeded to sell a moiety of what then remained undisposed of of Mugbhát *oart*, reserving a space of 2,710

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI *et. al.*

square yards in the central portion of the *oart*, as the enclosure within which the future temple was to stand. They sold to Náráyan Báláji for Rs. 6,000, two strips of the *oart*, respectively on the north and south of the central portion; a plot containing 549 square yards was also assigned to Sadobá Yesobá under the bequest to him in Jánki's Will.

The erection of the temple on the unsold portion of the *oart* was then commenced and proceeded with. The money for the works was supplied by Lakshmi and Sadobá as long as Sadobá lived, and after Sadobá's death (which took place in October 1851) by Lakshmi alone.

The temple itself cost Rs. 2,500, and some other immediately adjacent buildings from Rs. 1,000 to Rs. 1,500; altogether, say, from Rs. 3,500 to Rs 4,000. Before Sadobá's death, on the 25th of September 1850, Pusu Lakshuman, who as sister's son of Vithal Piláji, living at the death of Jánki the testatrix, asserted a claim to the inheritance, and who, on petition, had been allowed to refer the question of such alleged claim to the Attorney for Paupers, executed a release to Lakshmi and Sadobá, formally renouncing all his claims on the inheritance for the sum of Rs. 1,750 The execution of this release by Pussu, with full knowledge of its nature and effect, together with the payment to him by instalments of the full sum of Rs. 1,750, were facts clearly proved by Morobá Dámodhar, now a clerk of Mr. C. Tyabji, then a clerk of Messrs. Ayrton and Walker. Pusu himself admitted the execution and the payment, and finally, after many equivocations, on his examination by the Court, just before the close of the case, further admitted what he had up to that time attempted to deny, that the release and all its endorsements were fully read over and explained to him; that he knew what he was about, and that the sums he had received were received by him as the consideration for his giving up all claim on the inheritance.

On the 2nd March 1852, the temple being complete, and ready for worship, was dedicated. On this occasion, Lakshmi, Hiru, the second defendant, then about twenty-two or twen-

ty-four years of age, and Mahádev, the first defendant, then about fourteen years of age, were present. Rámji Krishṇáji (Lakshmi's son, and father of Mahádev) had died the year before, but before his death had shown his assent to the gift in *dharm* by actively superintending the works connected with the building of the temple.

Just before the actual ceremony of dedication, Lakshmi performed the ceremony of *sankalpa*, and she took an active part in the day's proceedings as patroness of the charity, telling the people who were assembled there that she had caused the temple to be built and endowed.

By Lakshmi's direction a stone slab was affixed at one side of the entrance of the temple bearing an inscription, which was read aloud in the presence and hearing of Lakshmi and the other persons present at the ceremony. The inscription, engraved in Maráthi-Bálbodh characters, was in these words :—

"In the Shake 1773 (being Vembhut) in the month of Fálgun Shudhya 12th, Wednesday" (2nd, March 1852), "Jánkibái, the widow of the late Viṭhal Piláji, with the intention of erecting a temple of Shri Viṭhoba in Mugbhát *oart*, made a *dharm* writing; afterwards she died. Lakshmibái, her husband's sister, then accomplished her object, by building a temple agreeably to the same *dharm* writing. For the purpose of defraying the expenses of this temple, this *oart* has been made over to Krishṇa. The authority over this religious foundation has been given over to Vedmurti (learned in the Vedas) Bháskar Trimbak Achárya."

The clear result of this evidence as to what took place at the dedication is that Lakshmi represented herself, and allowed herself to be represented, as having caused the temple to be built in pursuance of the *dharm* writing and will of Jánki. That Hiru also assented to what was done is clear from her evidence, in the course of which she said, "I was present when the temple was consecrated, with my mother, Lakshmi; Mahádev was also there, a boy; Rámji (Krishṇaji) was dead. I was twenty-two or twenty-four

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI. *et. al.*

when the temple was consecrated: thought it a very good thing in my mother to consecrate the temple; thought she was quite right in doing what Jánki enjoined her to do. I assented to all that was done at the consecration"

Elsewhere she said, "The property cannot be sold; it is charitable property. The temple was built by Lakshmi under the direction of Jánki, in order that her name might be known and made famous." Again, she said, "Lakshmi and Rámji, while they lived, considered themselves trustees of the Novroji Hill property and of this *oart* for the purposes of the charity." As to Rámji she said, "Rámji used to superintend the works at Mugbhát till he died. He did so as one of the family interested in the *dharm*."

From this evidence it clearly appears that Rámji till his death, and Hiru to the present time, must be taken as assenting to the *dharm* writing and Will of Jánki.

Immediately upon the dedication the plaintiff was put in possession of that portion of Mugbhát *oart* enclosed by walls on which the temple stands, and from that time he collected all the rents and profits of that part of the *oart* down to 1862, when Lakshmi, then hostile to him, gave notice to the *Bhandáris*, and to the occupants of the *kadján*-roofed buildings in the enclosure, not to pay rents to the plaintiff, since which time the plaintiff has not received the rents of these two buildings, nor any payments from the toddy drawers, but has continued to take all the other rents and profits of Mugbhát *oart*.

With regard to the rents of the Novroji Hill charity house (No. 167), only three payments were made by Lakshmi to the plaintiff for charity purposes from those rents, and these three payments seem also to have been made shortly after the dedication of the temple, though at what precise time the last was made does not distinctly appear. Lakshmi, according to the plaintiff's evidence, never refused expressly to make him payments for charity purposes from these Novroji Hill rents, never distinctly denied his right to claim them under Jánki's *dharm* writing, but simply failed to pay, and put him off with promises from time to time.

The plaintiff, who, according to his own statement, had built a house and *chál* in the temple enclosure out of his own moneys, for which he had got repaid, soon found that the rents of that part of Mugbhát *oart* in which the temple stood were not alone sufficient for the proper maintenance of the charity; a state of ill-feeling sprung up between him and Lakshmi, the first overt act of which seems to have been the notice given by Lakshmi, in 1862, to the *Bhandáris* and to the tenants of of the two *kadján*-roofed buildings not to pay rents or moneys to the plaintiff.

On the 5th of June 1863, Lakshmi, as surviving trustee under the Will of Jánki, commenced a suit in this Court against Bháskar Trimbak Áchárya, to remove him from his office of taking care of the temple, on several alleged grounds of misconduct. In the second paragraph of her plaint in this suit Lakshmi, after setting forth, the grant of probate of Jánki's Will to Sadobá Yesobá and herself, and the subsequent death of Sadobá, describes herself as left, on Sadobá's death, "*sole executrix and trustee under the said Will,*" of the trusts of which she (Lakshmi), as such surviving trustee, undertook the execution.

In the 4th paragraph of that plaint Lakshmi alleges "that, in pursuance of the terms of the said Will (*i. e.*, the Will of Jánki) a portion of Mugbhát was sold, and on the moiety thereof remaining unsold a temple was built and dedicated to Shri Vithoba Rakhmái, and the said temple was placed under the care of the defendant (Bháskar Trimbak) by the plaintiff (Lakshmi) as such surviving trustee as aforesaid.

While this suit was still pending, Lakshmi, in November 1863, died; attempts were made by her representatives to revive the suit, but without success; and on the 2nd of November 1864, the suit was abated by order of the Court, with costs to the defendant out of the estate. On the 11th of December 1865, a house on Novroji Hill was accordingly attached at the suit of Bháskar for his costs but he did not proceed to sell, owing to that house having been already mortgaged, in October 1865, to the fourth defendant.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHA'DEV RA'MJI *et. al.*

The house in which Lakshmi died and in which she had principally resided during her life was not the charity house (No. 167), but a house which had come to her from her husband, No. 105, Novroji Hill. In this latter house Lakshmi occupied the ground-floor, letting the upper part to tenants and here she lived with her son Rámji Krishṇáji during his life, her daughter Hiru, and her son's son, Mahádev Rámji. The two latter appear still to occupy rooms in the house No. 105.

After Jánki's death, the charity house on Novroji Hill had been let to tenants, only one room on the ground-floor having been reserved for Lakshmi; in this room were placed the silver images of Viṭhal Piláji's gods, and *shrádh* ceremonies for the benefit of his soul were occasionally performed there by Lakshmi.

On the 29th of December 1864, the house, No. 105, Novroji Hill, had been mortgaged by Mahádev Rámji alone to Vandrávandás Virjlál for Rs. 3,000, and on the 10th of October 1865, both 105, Novroji Hill, and also the charity house, No. 167, were mortgaged by Mahádev Rámji, Lakshumaṇ, and Hiru, to Pránjivandás Máthuradás, the 4th defendant, for Rs. 7,000.

I am quite satisfied that this mortgage was, as regards the fourth defendant, completely *bonâ fide.*

On the 6th of April 1867, Mahádev Rámji, nominally for the consideration of Rs. 2,000, mortgaged to Musá Abdul, Rahim, the fifth defendant, a piece of ground with cocoanut trees and a hut upon it containing a little over 555 square yards, situated within the temple enclosure in Mughbát *oart.*

I am satisfied on the evidence, that before the execution of this mortgage, defendant No. 5 had full notice that this was ground given in *dharm.* (His lordship reviewed the evidence on this point as well as the evidence relating to an alleged sale, on the 8th June 1868, of the mortgaged premises to the sixth defendant, under a power of sale contained in the indenture of mortgage, which alleged sale he found was not a *bonâ fide* sale and proceeded.)

This alleged sale of the 8th of June 1868 was followed almost immediately by the commencement of the present suit, the plaint in which was filed on the 15th of the same month. Having thus therefore stated the result of the evidence as to all the material facts in the case, the next step is to consider the various questions of law that were raised in the argument and discussed with much research and ability by Mr. White for the plaintiff and Mr. Marriott for the first defendant.

The first question of law that presents itself for decision is whether Jánki (her *status* being such as has been already described) had a right by Hindú law to dispose by Will or religious gift of the whole of her late husband's immoveable property in *Krishnárpan*."

The answer to this question must be, I think, in the negative. The nature of the Hindú widow's estate over immoveable property inherited from her husband has been much discussed of late and must now be considered authoritatively settled by the recent decisions in the Privy Council. In the first of these in point of date, decided on the 1st of February 1867; *Mussámut Thakoor Dáyhee* v. *Rai Bálack Rám* (*b*), the Privy Council determined that, though according to the Mitákshára a Hindú widow may dispose of moveable property inherited from her husband—a power she does not possess under the law of Bengal,—yet by both laws she is restricted from alienating any immoveable property *whether ancestral or self acquired* so inherited—On her death the immoveable and the undisposed of moveable property pass to the next heirs of her husband.

The next, I believe the last, case on the point before the Privy Council, was decided on the 14th March 1868: *Bhugwándeen Doobey* v. *Myná Báee* (*c*) In this case their Lord ships (*d*) treat it as "settled" (*i. e.* in all the schools) beyond all question that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *stridhan*, but passes upon her death to

(*b*) 10 Calc. W. Rep. P. C. C. 3 (*c*) 9 Calc. W. Rep. P. C. C. 23.
(*d*) p. 30 ibid.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI. *et. al.*

the next of kin of her husband. Their Lordships further held that according to the law of the Benáres school the same rule applies to moveable property inherited by a widow from her husband as to immoveable.

It was not probably the intention of their Lordships in laying down the rule so absolutely in restriction of any alienation by the widow of immoveable estate inherited from her husband to exclude her right to alienate portions of such estate for necessary purposes or for spiritual uses. All the books seem to concur in giving her such powers to a certain limited, though nowhere clearly defined, extent; but to hold that such powers extend to a gift in *dharm or krishnárpaṇ*, as in this case, whether by Will or by religious ceremony, of the whole or all but the whole of the immoveable property inherited by a widow from her husband would be a position inconsistent both with the letter and spirit of the recent decisions which have defined the limits and the nature of the Hindú widow's estate.

On these grounds neither Jánki's *dharm* writing nor her Will nor her religious gift in *krishnárpaṇ* could in my opinion be supported, if they stood alone, as binding upon the heir or heirs of her husband and the only question therefore is whether the heir or heirs of her husband, has or have not so far adopted, ratified, and acted upon them as to have estopped himself or themselves and privies in estate from now contesting their validity.

This leads to the inquiry, who at Jánki's death was the heir or who were the heirs of Viṭhal Piláji. That the death of the widow is the true point of time to fix on in order to ascertain who are to take as heirs of the deceased husband must now be regarded as a clearly established rule. "It is settled," says Sir Barnes Peacock in delivering the judgment of a full Bench Court at Calcutta, "that the widow does take as heir to her husband in default of issue and that upon her death those persons succeed as reversionary heirs who would have been the heirs of her husband if he had died at that time (e)."

(e) 9 Calc. W. Rep. Civ. R. 508.

Now, from the statement already made as to the members of Vithal's family alive at Jánki's death, it clearly results that at that point of time the heir and the only heir of Vithal Piláji was his sister, Lakshmi; Pusu Lakshuman, as son of a sister of Vithal Piláji, who had died before his widow, had, according to the law prevailing at this side of India, no claim in my opinion as against Lakshmi the surviving sister to be reversionary heir of Vithal Piláji on Jánki's death. It has recently been held by the Privy Council that according to the Mitákshára law (which, speaking generally, regulates us here) a sister's son cannot inherit, *Thakoorain Sahiba* v. *Mohun Lall* (*f*).

As though to show the uncertainty of almost all points in Hindú law, the Full Bench in Calcutta, in a still more recent decision, have held that the Privy Council in the above case only decided that a sister's son could not inherit as a *sapinda* or heir of the first class, and they further held that a sister's son under the Mitákshará law may inherit as a *bandhu* (*i. e.*) as a kinsman sprung from a separate family but allied by funeral oblations : *Omrit Koomaree Dabree* v. *Luckhee Narain Chuckerbutty* (*g*) Even assuming this decision to be well founded, still Pusu, as sister's son to Vithal Piláji and claiming as a *bandhu*, could only come in after Lakshmi, his (Vithal Piláji's,) surviving sister who took as a *sapinda*, nor would he have any claim till the failure of Lakshmi's nearer heirs : but even if Pusu had any vested claim to the inheritance on Jánki's death, as I think he had not, he must be held to have abandoned it by the release of the 25th of September 1850. This release coupled with the facts already stated must be taken as completely estopping the second defendant from setting up any claim whatever to any part of the property in question in the present suit.

Lakshmi, therefore, having been entitled on the death of Jánki to succeed as sole reversionary heiress to the property of Vithal Piláji, the next question is what was the *quantum* and nature of the estate she so took.

(*f*) 7 Calc. W. Rep. P. C. C. 25. (*g*) 10 Calc. W. Rep. F. B. R. 76.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI et. al.

The answer is that Lakshmi taking as sister took absolutely.

This appears clear from the decision of the late Supreme Court of Bombay in *Venáyak Anandráv* v. *Lakshmibái* (*h*) which was confirmed on appeal by the Privy Council (*i*). It is there distinctly laid down that sisters, like daughters, take absolutely.

The next question is, what was the course of the descent of the estate that Lakshmi thus took absolutely, (*i. e*) supposing her not to have disposed of it as she might in her lifetime to whom would it go on her death. Mr. Marriott's position that upon the estate vesting in Lakshmi, as sister of Vithal, her son Rámji Krishnáji and his son Máhadev Rámji thereupon became jointly interested therein as copartners with Lakshmi must, in my opinion, be regarded as untenable; it seems opposed to the principles established in Hindú law regarding property coming by inheritance to women, and is inconsistent with the position already adverted to as established by the case of *Venáyak Anandráv* v. *Lakshmibái* (viz.) that the sister takes absolutely. My view is that Lakshmi, taking the property as heir to her brother Vithal, would take it as *woman's property*; and that the course of descent from Lakshmi would be first in the female line, the male line not being resorted to till the female was exhausted. It appears to me that the well known text in the section of the Mitákshará which treats of woman's property (*j*) must be regarded as law on this side of India, except so far as regards the widow's estate in property inherited from her husband, which estate has been taken out of the text of the Mitákshará on the strength of other texts inconsistent with it—such especially as that of Katyáyana cited by the Privy Council in the decision already adverted to as the latest in date on the subject of widows' estate (*k*) "The childless widow, &c., may frugally enjoy the estate or property of her late husband until she die; after her death the legal heirs shall take it."

(*h*) I. Bom. H. C. Rep. 117.
(*i*) Ibid 124; S. C. 9 Moo. Ind. App. 532.
(*j*) Mitak. Ch. II. Sec. 11 para 2. (*k*) 9 Calc. W. Rep. P. C. C. 23 and 30.

. These and similar texts are inconsistent with the notion that the estate (at all events the immoveable estate) which a Hindú widow inherits from her husband is to be ranked as woman's property; as property in which the woman takes an absolute interest and over which she has an absolute control; and accordingly it has been, as already intimated, conclusively decided by the Privy Council that immoveable property (and on the other side of India moveable estate also) so inherited by a Hindú widow from her husband is not woman's property or *stridhan*. To this extent (to the extent namely of the widow's estate) an exception has been introduced into the text of the Mitákshará by an authority binding on all courts in India. An authority was cited from Madras (*l*) which goes a great deal further and indeed, according to the marginal note, must be taken as establishing that according to Hindú law, property acquired by a woman by inheritance is not to be classed as *stridhan*. Strictly speaking, this would be convertible into the proposition that no property acquired by a woman by inheritance is to be classed as *stridhan*; but after carefully reading the judgment I am led to doubt (notwithstanding some strong expressions at page 316) whether the Court meant to go to that length or whether the judgment can be taken as affirming more than the position that some property acquired by women by inheritance is not to be classed as *stridhan*. The facts of the case did not make it necessary to go even to that extent: they were simply these: a mother left property (which must be taken as the Court finds at page 313 to have been her *stridhan*) and two undivided daughters of whom one survived the other: the question was between the rights of the husband of the sister who had died first and the surviving sister. The District Munsif held that, the sisters being undivided, the surviving sister succeeded to the *whole property* left by her mother whether the other sister predeceased her mother or not. The Court affirmed the District Munsif's decision intimating at p. 317 that even if the sisters had been divided they would have come to the same conclusion. "Whether

(*l*) *Sengamalathammal Valaynda Mudali.* 3 Mad. II. C. Rep. 312.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI *et. al.*

the sisters were divided or not divided it seems to us that so long as there was a daughter living she was entitled to the mother's estate in preference to any other claimant; for it is only on failure of daughters that other claimants can come in."

In this case it clearly appears that the Court decided on the principle that daughters taking woman's property by inheritance from their mother take it according to the rules that regulate the devolution of *stridhan*, and I am at a loss therefore to see how the case (apart from certain *obiter dicta* of the Court) can be cited as an authority for the position that property acquired by a woman by inheritance is not to be classed as *stridhan*.

The Bengal authorities, indeed, as the Court remarks in the case under discussion, (*m*) favour the supposition that *stridhan* which has once devolved according to the law of succession, which governs the descent of this peculiar species of property, ceases to be ranked as such and is ever afterwards governed by the ordinary rules of inheritance.

This may be sound doctrine, but it does not touch the facts of the case now before us and in course of decision. Here the brother's estate first became woman's property or *stridhan* (if it became so at all) in the hands of Lakshmi, and the first descent of it as woman's property was on the death of Lakshmi when, according to the ordinary rules of devolution in woman's property, it would go to Hiru, the daughter of Lakshmi, in exclusion of all other claimants whatever. It would not be till the death of Hiru, on its becoming necessary to inquire on whom the property would then devolve, that the position adverted to as established by the Bengal authorities of a change in the order of devolution would become applicable.

It seems to me on the best opinion I can form on the matter that Lakshmi taking by inheritance from her brother would take his estate as woman's property.

(*m*) 3 Mad. H. C. Rep. pp. 314, 315.

If that be so, then I think it also follows on the authorities that Hiru, the daughter of Lakshmi, would take as her sole heir in the first instance, males being disregarded until failure of the female branch. In other words Rámji Krishṇáji who died in the lifetime of his sister Hiru was no heir to Lakshmi, and his son, Máhadev Rámji, has as yet no share in the inheritance, whatever he may have on the death of Hiru, who is a childless widow.

The Mitákshará seems to lay down the law as to this matter very clearly. In the section relating to woman's property (Ch. II. sec. 11) in which occurs the much litigated text already referred to we find the following para. 9:—"If a woman (seized of woman's property) die 'without issue' that is, leaving no progeny—in other words having no daughter nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property as above described shall be taken by her kinsmen, namely, her husband and the rest." Here the course of descent is clearly traced, first to the daughter, secondly to the daughter's daughter, thirdly to the daughter's son, &c.; and only in failure of lineal descendants of the daughter then to the son, son's son, &c.

Again in para 12, "In all forms of marriage if a woman 'leave progeny'; that is, if she have issue, her property devolves on her daughters," para. 13 "Hence, if the mother be dead, daughters take her property in the first instance."

In para 19 a text indeed is cited from Manu to this effect "when the mother is dead let all the uterine brothers and the uterine sisters equally divide the maternal estate," but, as pointed out in para 20, this does not mean that if a woman, seized of woman's property, dies leaving both sons and daughters that the brothers and sisters are to *share together*; it merely means that if she die leaving only sons then all the sons share equally; if she die leaving only daughters all the daughters share equally; if she die leaving both sons and daughters the daughters take to the exclusion of the sons.

Lakshmi, then, according to my view, was, on Jánki's death, sole residuary heir of her brother Viṭhal Pilaji, and Hiru on Lakshmi's death became the heir of Lakshmi.

1869.

BHA'SKAR TRIMBAK ACHA'RYA v. MAHADEV RA'MJI *et. al.*

It now remains to consider how far Lakshmi by her conduct has not estopped herself and her privies in estate from contesting the *dharm* writing or gift in *Krishṇárpaṇ* by Jánki.

Now, as to Lakshmi it seems difficult to conceive a more complete course of concurrence with, and assent to, the validity of Jánki's Will and gift in charity than was throughout shown by Lakshmi. As appears by the facts already found as the result of the evidence, Lakshmi, before Jánki's death, joined at her request in the *sankalpa* ceremony and the gift in *krishṇárpaṇ* and expressed in words her entire assent to such gift. After Jánki's death Lakshmi with Sadobá Yesobá took out probate of Jánki's Will, sold one-half of the *oart,* and commenced building the temple on the other half. After Sadobá's death Lakshmi completed the building of the temple, installed Bháskar Achárya as manager, and put him in possession; took an active part in the dedication of the temple, and caused the slab to be put up which records among other things that Lakshmi, *after Jánki's death,* carried out Jánki's intention by building the temple according to the *dharm* writing. Finally, in 1860, Lakshmi brings a suit in the High Court as sole surviving trustee of Jánki's Will in order more fully to carry out her intention as founder of the charity, and, while that suit is still pending, Lákshmi dies. From first to last we find Lakshmi upholding Jánki's *dharm* writing and gift in *krishṇárpaṇ* and assuming to act as trustee for carrying out the same.

The extracts, from Hiru's evidence already given show that Hiru personally assisted at and assented to the dedication of the temple, and has all along considered and still considers that the trust of Jánki's *dharm* writing ought to be carried out.

Applying the conclusions above arrived at to the case of the first, second, and third defendants it appears to me that Mahádev Rámji has no right of inheritance vested in him in regard to the property in dispute, and therefore that all his dealings with such property have been wrongful and unlawful dealings. If indeed he can be considered as during Hiru's lifetime, and I do not think he can, as in any sense an heir of Lakshmi

possessing a vested right, then I think, as privy in estate to Lakshmi, he would be estopped by her conduct from disputing Jánki's will and gift in *dharm*. I feel clear, however, for the reasons above stated, that Mahádev has not now in him any vested right of inheritance in this property. I come clearly to the same conclusion with regard to Pusu Lakshuman, the third defendant, for the reasons formerly stated; and this defendant, moreover, even if he had any claim to the inheritance, as I am of opinion he had not, has as already intimated, lost all his right by the release of the 25th of September 1850.

As to Hiru, the second defendant, she is estopped from disputing Jánki's will and gift in *dharm* both by Lakshmi's conduct and by her own.

With regard to the other defendants, (No. 4) Prán̤jivandás Máthurádás for the reasons already set forth must be regarded as a *boná fide* mortgagee for valuable consideration without notice. His mortgage therefore must be sustained, and his costs paid by the plaintiff, with liberty to the plaintiff to recover such costs over from the first, second, and third defendants.

As to the fifth and sixth defendants the mortgage to the one and the sale to the other must be respectively declared invalid and set aside, and the plaintiff must have his costs against these defendants.

As to the seventh defendant, Her Majesty's Advocate General, having been joined as co-defendant by the plaintiff the plaintiff must pay him his costs.

The issues were found by the Court in accordance with the above judgment and the minutes of decree were drawn up accordingly.

Attorneys for the plaintiff,—*Acland, Prentis, and Bishop.*

Attorney for the 1st defendant.—*Pestonji Dinshaw.*

Attorneys for the 4th defendant,—*Rimington, Hore, and Langley.*

1869.
Feb. 11.

In the matter of THE BOMBAY JOINT STOCK CORPORATION.

In re THE SHERIFF OF BOMBAY.

Sheriff—Attachment of property—Poundage—Compromise.

Where property is attached by the Sheriff after judgment and the parties come to a compromise before the Sheriff sells any of such property, the Sheriff is only entitled to poundage on the amount received by the execution creditor in compromise of his claim.

THIS was a special case stated for the opinion of the High Court under the provisions of Chapter VII. of the Code of Civil Procedure.

The case stated that one Henry Vears was a contributory of the Joint Stock Corporation (Limited) and in that capacity indebted to the liquidator of the Corporation, and that in pursuance of an order of Arnould, J. of the 31st of August 1868, a share in the Colába Company, standing in the name of Vears was attached by the Sheriff on the 10th of September following, at the instance of the liquidator.

On the 6th of October it was ordered that a warrant should issue directing the Sheriff to sell the share; and on the 20th October a warrant for the sale of the share was issued accordingly. On the 24th of October this warrant was lodged for execution at the Sheriff's office by the liquidator, and the fees for entry were then duly paid, but, before the proclamation for sale was made, the liquidator compromised the claim of the corporation against Henry Vears for a smaller amount than was actually due.

On these facts the Sheriff contended that he was entitled to poundage on the full amount of the original debt for which attachment had issued. The liquidator contended that, as the Sheriff did not actually sell the property, he was not entitled to any poundage. He further contended, in case the Court should be of opinion that the Sheriff was entitled to some poundage, that the Sheriff was entitled to poundage on the amount actually recovered by the liquidator and no more.

The case came on for argument before ARNOULD, J. on the 11th of February 1869.

White for the liquidator. The Sheriff is only entitled to poundage on the amount for which the debt has been compromised. The principle is laid down by Alderson B. in *Rex.* v. *Robinson.*(*a*) He says, "The very principle on which the Sheriff is entitled to poundage shows that he is not entitled to more than on the sum actually received. What the Crown actually obtains, though not under the *direct* compulsion of the process, is considered as being in fact the amount levied by the hands of the Sheriff. If therefore the amount received by the Crown is to be taken as the criterion for one purpose it must be so also for another." *Alchin* v. *Wells* (*b*) will be relied on by the other side, but that case was virtually overruled by *Rex.* v. *Robinson.* The latter case does not seem to have been brought to the notice of the Appeal Court in the case of *Vináyak Vásudev* v. *Ritchie Stuart* (*c.*)

Mayhew for the Sheriff.—In *Rex.* v. *Robinson* the Sheriff was a party to the compromise which is not the case here; and the same peculiarity distinguishes it from *Alchin* v. *Wells,* which was cited and considered as good law in the case of *Vináyak Vássudev* v. *Ritchie Steuart,* which is a binding authority in this case.—*Miller* v. *Abbot* (*d*) is to the same effect.

ARNOULD, J.—I am very strongly against you, Mr. Mayhow. The rule stated by Baron Parke in *Rex.* v. *Robinson* is, it appears to me, supported on very good sense. There is nothing to prevent a creditor from realising by compromise instead of by sale; but if the contention for the Sheriff were allowed to prevail it would often be impossible for him to do so. I think the claim put forward by the Sheriff is a monstrous one. The Decree is that the Sheriff is entitled to poundage on the amount actually received by the creditor by way of compromise. There will be no costs on either side.

Attorneys for the Liquidators,—*Keir, Prescot, and Winter.*

Attorney for the Sheriff.

(*a*) 2 Cr. M. & R. 337. (*b*) 5 Term Rep. 470.
(*c*) 4 Bom. H. C. Rep. O. C. J. 139.
(*d*) I. Stra. Mad. Ca. 182.

1869.
Feb. 11.

Original Suit No. 553 *of* 1868.

DAVLATRA'M SHRIRA'M *et al.* ..... *Plaintiffs.*
BULA'KIDA'S KHEMCHAND..... *Defendant.*

Hindú Law of Contract—Forged Hundi—*Payment of Forged* Hundi *by Drawee—Refund by Payee—Mercantile Usage.*

According to mercantile usage amongst Hindús, where a *hundi*, drawn "payable to holder" (*sháh jogi*), is paid at maturity by the drawee to the *sháh* or holder of the *hundi*, and such *hundi* afterwards turns out to be forged, the *sháh*, though a *bonâ fide* holder for value, is bound to repay to the drawee the amount of such *hundi* with interest from the date of payment, provided the drawee has been guilty of no lâches in discovering the forgery and communicating the fact of such forgery to the *sháh*.

The *sháh*, however, relieves himself from such liability by producing the actual forger.

THE facts of this case sufficiently appear from the judgment of the Court.

It was tried by ARNOULD, J., on the 11th of January and following days.

The *Honorable L. H. Bayley* (Advocate General) and *Dunbar* for the plaintiffs.

White and *Scoble* for the defendant.

Cur. adv. vult.

ARNOULD, J.:—This was a suit for money had and received to recover back the amount of two *hundis*, one for Rs. 2,000, the other for Rs. 1,100, which had been paid by the plaintiffs to the defendant on the 24th of October 1867, and which afterwards, as the plaintiffs aver, turned out to have been forged. The plaintiffs also claimed interest on the amount at six per cent.

The sole issue raised was, whether the plaintiffs, under the circumstances disclosed on the evidence, were entitled to receive back the money claimed with interest as demanded.

This being a matter of contract in which both parties are Hindús has to be determined in this Court under cl. 29 of the Old Supreme Court Charter of 1823, continued in force by

cl. 18 of the Letters Patent of 1862, and cl. 19 of the Letters Patent of 1865, by the laws and usages of the Hindús, or by such laws and usages as the same would have been determined by if the suit had been brought and the action commenced in a Native Court.

The documents, on which the moneys sought to be recovered in the suit were paid, were *hunḍis* made payable to *shah sháh jogi,* and such *hunḍis* differ from bills of exchange in one very material circumstance, amongst others, that, as a general rule, the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit, and to that extent make it just to impose an additional degree of liability on the acceptor ; but, as a rule, the particulars are only entered in the drawee's books. It may be added also, as a general rule, that *hunḍis* are very frequently not presented for acceptance before they are presented for payment, before, that is, they are either due or overdue.

The general process is this:—The *sháh* or person who has bought or holds the *hunḍi,* and *whose name must always be indorsed on it before it is presented,* sends one of his men to the shop of the drawee, whose *killidár,* after referring to the particulars of advices relating to the *hunḍi* which have in due course been previously entered in the *chitti nond,* or bill-book, and finding it correspond therewith, thereupon enters in the journal the particulars of the *hunḍi,* viz., its amount, date, due date, name of *sháh* or person tendering it for acceptance, and whose name, as already intimated, is always indorsed on the *hunḍi.* He then returns the *hunḍi* to the servant of the *sháh* who takes it back to the *sháh's* shop. If the day of presentment be the exact due date, the amount is paid on that very day; *if* the *hunḍi* is overdue when presented, it is generally paid the next day, the reason assigned being that, unless presented on the actual due date—when of course its presentation is expected and provided for—the *munim* or principal of the firm may not be present, or there may not be sufficient cash in the hands of the *killidar* to meet the amount. Payment is made by

1869.

DAVLATRA'M SHRIRA'M *et. al.* *v.* BULA'KIDA'S KHEMCHAND.

sending the amount by a servant of the drawee to the shop of the *sháh*. On receiving the amount, the *killidár* of the *sháh* writes an acknowledgement in full on the back of the *hundi*, and sends it back to the shop of the drawee by the servant who has brought it thence.

It may make the case clearer to state the particulars of the two *hundis* in this case, and to copy the exact entry which the *killidár* of the plaintiffs made of them in their journal when they were presented for payment. Both *hundis* are precisely in the same form, only varying in amount—one being for Rs. 2,000, the other for Rs. 1,100. They purport to be drawn on the plaintiffs' Bombay branch, "Shrirám Davlatrám, at Bombay," by one Kantiprasád Behárilál, at Mayarámpur, in respect of the two sums of Rs. 2,000 and Rs. 1,100 respectively stated in the entry of each *hundi* to have been deposited at (or paid into) the Gwálior branch of plaintiffs' firm, "Kisandás Bálmakund," by one Kunyálál Joharimalprasád, merchant. Each is made *payable to sháh* forty-five days after the 27th of August 1867. These forty-five days would expire on the 11th of October 1867, but as their due date is stated to have been the 14th and 15th of October 1867, it is to be taken that three days' grace were allowed on them. When presented for acceptance at the plaintiffs' shop, on the 24th of October 1867, each had this indorsement upon it:—"this *hundi* was sold by Kunyálál Johárimalprasád to Khemchand Mulchand, defendant's firm."

Defendant's firm, by virtue of this indorsement, became the *sháh*, to whom the *hundi* was payable.

On the 24th of October 1867, a man of the defendant's Bombay branch presented the two *hundis* for acceptance at the plaintiffs' shop of Shrirám Davlatrám, at Bombay, the drawee of the *hundis*. The *killidár* of Shrirám Davlatrám then, having satisfied himself by reference to advices and the entries in the *chitti nond* that the *hundis* were all right made the following entry in his journal:—"Debited to Kisandás Bálmakandás of Luskar (the plaintiffs' branch firm at Gwálior) under date 3rd Kártik Vud—(that is the due

date of the *hundis*, and in the Maroo reckoning corresponds with our 14th and 15th October); debited to your account drawn from Máyarámpur by Kanti Prasád Bchárilal, the money having been deposited by Kunyálál Johárimalprasád, a merchant, drawn on Bhadurva Vud 13 (27th August) at forty-five days, one for Rs. 2,000, another for Rs. 1,100. Credited to Khemchand Múlchand on Kártik Vud 13 (*i.e.* the 25th of October, the day after presentation, being that on which being overdue, the amount of the *hundis* would properly be paid) drawn on us and accepted the 12th Kártik Vud (the 24th of October.) These *hundis*, when presented, were nine days overdue, and therefore, according to rule, should not have been paid till next day (25th October), on which day accordingly they were credited to the defendants; but that day being one of the Diváli holidays, and, Khemchand Múlchand, the *sháh* being known to plaintiffs as a respectable shroff, the amount was paid on that very day.

Now, before going into what is disputed in this case (*viz.* the existence of a rule of the Indian law merchant that there should be a refund on *hundis* made payable to *sháh* in cases where it afterwards turns out that the *hundis* are forged, or fraudulent,) it will be convenient to advert to those points in which both parties substantially agree. And first as to the very important point of the meaning attached in the Hindú mercantile world to the formula "payable to *sháh*." Now, the result of the evidence on both sides as to this point, supported by the learned etymological evidence of Mr. Báláji Pandurang, is clearly this, that *sháh* means *a responsible and respectable person, a man of worth and substance known in the bazár. A hundi payable to sháh is paid on the responsibility of the sháh.* If he be not known to the drawee, inquiry is made about him, and the amount of the *hundi* is not paid till that inquiry is satisfactorily answered, or till some one known to the drawee is found to identify him or speak to his responsibility.

The reason of this, say the plaintiffs' witnesses, is that if the *hundi*, after having been paid to the *sháh*, turns out to have been forged or lost or stolen, recourse may be had to

1869.

DAVLATRA'M SHRIRA M *et. al.* *v.* BULA'KIDA'S KHEMCHAND.

the *sháh* to procure a refund. Not so, say the defendant's witnesses, in the case of forged *hunḍis*; in such case there can be no refund, but we quite admit it is so in the case of lost or stolen *hunḍis*. Thus, of the defendant's witnesses, his Bombay *munim* says, "*sháh jogi*" means payable to a responsible person; another witness for the defendant, says, "*sháh jogi*" means "payable to some one who is known or, if not known, who can get some one to speak to his character." Another witness for the defendant, the Bombay *munim* of the leading or *panch* Gujaráti shroff's firm of Gokulbhái Múlchand, says, "*sháh jogi* means payable to a respectable and responsible person, in order that if the *hunḍi* afterwards turns out to have been lost or stolen, then, on failure to produce duplicate or triplicate, the *sháh* to whom payment has been made must refund." This same witness added—"In order that the person to whom payment has been made shall be able to refund, if occasion arises, he must be a *sháh*—that is, a respectable or responsible person." The defendant's witness, the Bombay *munim* of the considerable Gujaráti shroff's firm of Mansukbhái Bhagubhái says, —*sháh*, means that the person to whom the *hunḍi* is paid must be a responsible person." Another witness of the defendant, the *munim* of the Gujaráti firm of Bechardáss Mánchand, after saying the same thing almost in the same words gives the reason thus.—"The reason of drawing *hunḍis* payable to *sháh* is this: supposing the *hundis* to have been lost or stolen, then, on producing the duplicate to the *sháh* he may refund it; that is, why he ought to be respectable." These are all extracts from the evidence given for the defendant.

There is another point of considerable importance as to which the witnesses on both sides are agreed. It is this—a *hunḍi* ought not to be paid by the drawee unless it has indorsed on it when presented the name of the *sháh* by whom it is presented, or rather by whom it is sent for presentation. In the case of the two *hunḍis* with which we are concerned in this suit each bears this endorsement:—"This *hunḍi* was sold by Kunyálál Joharimalprasád to Khemchand

Múlchand." This indorsement the defendant says was made by Kunyálál in his presence. And defendant's Bombay *munim* states, as the fact is, that the indorsement is in the proper and usual form. Of the defendant's witnesses (whom alone I shall cite on this point) the Bombay *munim* of the *panch* or leading firm among the Gujaráti shroffs, of Gokalbhái Múlchand, says—"The *hundi* is always indorsed payable to the party who presents it; if his name is not on it we should not accept it." The Bombay *munim* of Mansúkbhái Bhágubhái, says—"We look at the indorsement on the *hundi* making it payable to the person who presents it for payment; if satisfied, we make payment, and in due course pay."

It seems to me that this evidence strongly tends to show that the drawee of the *hundi*, in accepting and paying it looks very mainly to the *sháh* as responsible in case of anything afterwards going wrong with the *hundi*; and that he relies on the solvency and respectability of the *sháh* as one of the principal grounds in inducing him to make payment without further inquiry.

As has already appeared by the foregoing extracts from the evidence, there is another important point on which the witnesses of the plaintiffs and those of the defendant substantially agree, and that is, that on certain conditions, such as first challenging the production of duplicate triplicate &c., the drawee who has paid the amount of a lost or stolen *hundi* payable to *sháh* is entitled to a refund from the *sháh* to whom it has been mistakenly paid. But while admitting this, the defendant's witnesses, with one exception, namely, Rámgopál Kinirám, *munim* of the Bombay branch of a large shroff's firm having its head-quarters at Hyderábád, strongly deny that there can be any refund on *forged hundis*. On the other hand, the plaintiffs' witnesses, who in length of experience and extent of business are unquestionably superior as a body to the witnesses of the defendant, declare that the case of forgery forms no exception in India to the general rule; and that it has been an immemorial custom all over India—a part of the law merchant of India—as old as

1869.
DAVLATRA'M SHRIRA'M *et. al.* v. BULA'KIDA'S KHE MCHAND.

the existence of shroffs and shroffing in the country, that where a *hundi* "payable to *sháh*" has been paid by the drawee to the *sha* who presents it, and afterwards turns out to have been forged, then, on discovery of the forgery and communication thereof to the *sháh*, the drawee, who has paid the amount of the *hundi*, is entitled to have that amount refunded by the *sháh*, together with interest at six per cent. (or close upon it) from the period of the mistaken payment till that of the refund. Five of these witnesses are *munims*—and *munims* of some standing—of the five largest Márváḍi shroffs' firms in Western India—of Ganesh Krishṇáji, the leading or *panch* house of Márváḍi shroffs in Bombay; of Shivlál Motilál; of Hazárimal Narsidás; of Bansilál Amirchand; and of the plaintiffs, Shrirám Davlatrám, each of which has passing through their Bombay branches alone some crore or million sterling of *hundis* in the course of the year. It will be sufficient to extract from the evidence of two of the most intelligent of these witnessess,—that of the Bombay *munim* of Shivlál Motilál, and that of the Bombay *munim* of Hazárimal Narsidás. The former says "the amount of a forged *hundi* must be refunded with interest at six per cent. (or a little under) from date of payment. The *sháh*, or person to whom the money has been paid, must point out the responsible person (the drawer), and, if he do not, he is responsible himself; if he do, the drawer must refund. We, in every case, look to the *sháh*, *i.e.*, the person who brings the *hundi* to us for payment, as the responsible party." The latter says "in all cases we pay on the responsibility of the *sháh*. If the *hundi* turns out to be forged or stolen, the *sháh* to whom the money has been paid is obliged to refund it to the person who has paid it with six per cent. interest. This is the universally established custom throughout India among natives. It is as old as shroffing; it has been the custom since shroffing came into existence."

In cases where the *hundi* turns out to be forged, application for duplicate, triplicate, &c., would be little more than a nugatory form, and, on the evidence, is not to be taken as

necessary, though it is necessary, and with reason, in the case of lost or stolen *hundis*. In the case of forged *hundis* No. 6 and No. 10 represent that if the *hundi* turns out to be forged, the *sháh* has to refund even though he has been applied to for, and has produced, duplicate, and triplicate, unless in fact he produces the forger,—a case not very likely to arise in practice.

It has been objected that the custom, as stated by the plaintiffs' witnesses is unreasonable, because alleged to be without limitation of time. "This I take to mean without *fixed limitation* of time, as for many months, or many years; it is not meant (which would indeed be clearly unreasonable) that if the discovery or communication to the *shá* of the fact of the forgery is delayed by the lâches or negligence of the drawee that he can, in such case, claim a refund from the *sháh*. The rule, I take it, as substantially sought to be established by the plaintiffs' evidence is this, that in the absence of any proof of connivance or lâches on the part of the drawee, who has paid to *shá* on presentation a *hundi* drawn "*sháh jogi*," the drawee, on the *hundi* afterwards turning out to have been a forged *hundi*, is entitled to a refund from the *sháh*, though an innocent and *bonâ fide* buyer of the *hundi* for full value, with interest at six per cent. from the day of payment to the day of refund, provided that the drawee has discovered the forgery as soon as according to the usual course of business it could be discovered, and has lost no time in communicating the fact of forgery to, and in making his claim for refund upon, the *sháh*.

Taking this to be a rule, I can see nothing unreasonable in it, as applied to Indian *hundis* bearing in mind the evidence in which both sides agree, as to the degree in which the drawee of an Indian *hundi* looks to and relies upon the responsibility and respectability of the *sháh* who presents it to him for payment; and as to the existence of such a rule, as a part of the law merchant of India, I think the weight of the evidence preponderates decidedly in favour of the plaintiffs.

1869.

DAVLATRA'M SRIRA'M *et. al.* *v.* BULA'KIDA'S KHEMCHAND

In instances, indeed, of the application of the alleged customary rule to practice, the evidence of both sides is very weak; no single specific and well attested instance of a refund in the case of a forged *hunḍi* was adduced by the plaintiffs' witnesses. The *munim* of the plaintiffs' Bombay branch said indeed, "I have known many instances at Delhi, Jaipure, Benáres, and other places in which refund has been made on forged *hunḍis*." But he did not give the particulars of any single case. He added, "since the British *ráj* shroffs have made objections to refund; before they used to pay as a matter of course." He did specify two instances of a refund on stolen *hunḍis* at Calcutta; but as to stolen *hunḍis* there is really no question at issue between the plaintiffs and the defendant, the bulk of the defendant's witnesses agreeing on this point with all the witnesses of the plaintiffs that refund is the rule in the case of *stolen hunḍis*. Plaintiffs' witness No. 3. gave particulars of a case of a refund on a *hunḍi* which, on his examination in chief, he said was forged; but on cross-examination it turned out that he could not be positive whether the case was one of a forged or stolen *hunḍi*.

With reference to stolen *hunḍis* a curious fact was elicited in the examination of the plaintiffs' witnesses, viz. that the great *panch* house of Gaṇeshdás Krishṇáji in Bombay had failed to refund on a *stolen hunḍi* in respect of which claim had been made on them so to do. Plaintiffs' witness Kavalchand Amirchand, who seems to be a sort of consulting manager of Gaṇeshdás Krishṇáji said, with reference to this case, that he had told Benáichand, the late Bombay *munim* of Gaṇeshdás Krishṇáji, now absconded and under suspicion of having abstracted moneys, that he ought to refund this amount, and that Banáichand had promised to do so, but never did. Of the witnesses for the defendant Maganlál Parbhudás, partner in the firm of Lallubhái Parbhudás, spoke very confidently to a case which had occurred about fifteen years ago in which his firm had been paid by Johárimal Shivlal the amount of a *hunḍi* for Rs. 50, which a year and a half after turned out to have been

forged: a claim for refund was made by Johárimal Shivlál. A *panchâyat* was called at the *panch* house of Ganeshdás Krishnáji. The witness was not present at the *panch* having been only about sixteen at the time, but he had always been told, and he took upon him to affirm, that the decision of the *panch* was *against* the refund: of this he was sure (and in this his evidence appears correct,) that no refund had ever actually been made by his firm. To rebut this evidence an old Márvádi, Rámnáráyan Dayárám, a partner in the firm of Johárimal Shivlál by whom the amount of the forged *hundi* had been paid, was called. He *had* been present at the *panch* and swore positively that the decision of the *panch* was that a refund *should* be made: to support this he produced his books, which clearly showed that he had charged the amount of the payment as of the date on which it was made in his account with Lallubhái Parbhudás, but he admitted that the account had never been finally adjusted, that interest at six per cent. had accordingly not been computed, calculation of interest not taking place till final adjustment, and that the amount had thus not actually been paid.

Upon this evidence the fair conclusion seems to be that the decision of the *panchâyat* on the occasion referred to was in favour of a refund, although in *fact* no refund was made and that the instance, when sifted, is in favour of the plaintiffs. It shows how imperfectly the case for the plaintiffs has been got up, that the evidence of this man Rámnáráyan was not adduced in the first instance, instead of being brought in almost accidentally in contradiction of one of the defendant's witnesses. The defendant's witness Atmárám Rájárám mentioned, with particulars, two instances in which, some five or six years ago, the *panch* house at Puná of Dayárám Atmárám, the Puná branch of the great firm of Jarráchand Atmárám, which after a duration of some three centuries fell in the late share mania, decided against a refund in the case of two *forged hundis*. This evidence, if it could be relied upon, would be very important: but I feel clear it cannot be relied upon; it has not been sifted, if it had, it might turn out, as in the case

1869

DAVLATRA'M SHRIRA'M *et. al.* *v.* BULA'KIDA'S KHEMCHAND.

deposed to by Maganlál Parbhudás, that the decision of the *panch* was exactly the other way: the witness Atmárám Rájárám, moreover, is in the same position precisely as the defendant in this case, having been paid the amount of two other *hundis* one for Rs. 2,000 and the other for Rs. 1,000, which together with the Rs. 3,100 now sued for, make up the Rs. 6,100 the aggregate of the forged *hundis* drawn by Beháriмal on Shrirám Davlatrám. A refund has been claimed from him, and he has been served with notice of an action, the result of which, as he said, he understood will depend on the decision in this suit.

It seems extraordinary that so few instances can be adduced of the application of a rule said to be universal in India; the reason may be found, partly in the extreme rarity of the occurrence of a forged *hundi*—a rarity which is deposed to by all the witnesses for the plaintiffs, and admitted by the great bulk of the witnesses for the defendant; something also must be attributed to the absence among Hindú shroffs of any available means of recording such cases as they arise. They have no mercantile journals or printed mercantile records of any kind: all depends on memory, and though their memory for particular facts and figures bearing on their every day business is very tenacious, yet they have but limited powers of observing general facts, or of bringing them out in evidence for the elucidation of a legal enquiry.

In order to supply in some degree what was wanting in this respect the *panch* house of Ganeshdás Krishnáji on the 17th February 1868, called a meeting of shroffs at which there was embodied in writing the rule for the establishment of what, by a legal decision, the plaintiffs are now desirous of. It has been contended for the defendant that the writing or *bandobast* drawn up at this meeting was not so much the embodyment of an old rule, as the promulgation of a new one for future guidance. In this view I cannot concur; the evidence I think clearly shows that Kavalchand Amirchand spoke truly in saying, "I drafted that writing so as to embody what I believe to be the old and universal rule of practice." This was the primary object, though of course

the writing was also intended to serve the purpose of forming a guide for future practice.

This writing was signed by 189 firms of Guzarâthi and Márvádi Shroffs in Bombay: some firms, like that of Mansukbhái Bhagubhái may "have signed the writing under compulsion, because, unless they did, Ganeshdás Krishnáji would not pay *hundis* for them;" but after making all reasonable reductions on this account it still remains true that the writing has been signed by a very large number of the most influential shroffs' firms in Bombay, because it expresses their sense of what the law merchant of India, as to the point to which it relates, both has been in the past and ought to be in the future.

To revert now from consideration of the general custom to the more special facts of this particular case. Does the evidence show the defendant to be an innocent and *bonâ fide* indorsee of these *hundis* for full value? To this I answer that it clearly does, and I accordingly find that he was so.

Then is the forgery sufficiently proved? It seems to me that it is: it was carried out no doubt by very extraordinary means; by first intercepting the letters passing between the Gwálior *munim* and the Bombay *munim* of the plaintiffs' firm; next by copying out the contents of those letters accurately, adding only a passage relating to the forged *hundis* for Rs. 6,100; and then by transmitting the letters with the interpolated passages thus added to Gwálior and Bombay under the signatures—(so well imitated that had they stood alone they would have deceived even the supposed writers themselves,) of the Bombay and Gwálior *munims* respectively. The Gwálior *munim* swore that the respective sums of Rs. 2,000 and Rs. 1,100, stated in the body of the *hundis* to have been deposited with the Gwálior firm, were never in fact deposited there: both the Bombay and Gwálior *munims* swore that the letters purporting to bear their respective signatures were forgeries. The Gwálior *munim* swore that though the residue of the contents of the Gwálior letters were correct transcripts from the genuine letters, yet the interpolated passages regarding the Rs. 6,100 of *hundis* were pure fa-

1869.

DAVLATRA'M SHRIRA'M *et. al.* v. BULA'KIDA'S KHEMCHAND.

brications: the Bombay *munim* swore that in two letters of 11th and 18th September respectively, he had answered the interpolated passages in the Gwálior letters relating to these *hundis*: the Gwálior *munim* swore that he had received no letters from Bombay containing a syllable relating to these *hundis*: the inference of course being that these two letters from Bombay, which, if received at Gwálior, would have led to instant detection of the fraud, had been intercepted like the rest and sent on copied with the exception of these passages relating to the advices as to the forged *hundis*. On the whole I am of opinion that the proof of forgery is reasonably and substantially sufficient.

It was urged that it was impossible that such a fraud could have been carried out without the concert or connivance of some of the servants of the plaintiffs' firm, but though it may be difficult, it is certainly not impossible, to conceive that this may not have been so; and so tortuous and complicated are the ways of fraud in this country, that I should be very slow, without any evidence on the point, to come to the conclusion that any person in the employ of the plaintiffs must necessarily have assisted in carrying out this elaborate scheme of roguery.

Then was the fraud of such a nature that the plaintiffs can be charged with want of due care and vigilance in being taken in by it? I think not; it is easy to be wise after the event, but I really do not see how any average set of mercantile agents could reasonably be expected to have been proof against so strange and artfully contrived a piece of deception as this: as the *munim* of the plaintiffs said, besides the perfect resemblance of the signatures, "all the other matters (except what related to the *hundis*) mentioned in the letters were real transactions—that is what took us in," and I must say any one in the world not gifted with a quite preternatural acuteness might have been taken in, in the same way.

Then, have the plaintiffs been guilty of any laches in discovering or communicating to the defendants this forgery

which ought to disentitle them from recovering in this suit? Here again I think not. These people must be judged not by our modes of doing business, but by their own mode of doing business. It is the practice, it seems, of the plaintiffs' firm and of other firms similarly situated, that one branch firm does not communicate to another branch firm the payments it has made upon *hundis* in respect of which that other branch has written advices to it, but an account is sent fortnightly of all such payments, and of all other incomings and outgoings, by each one of the branches to the head firm, which in the case of the plaintiffs, happens to be at Navalghar, a place some five or six days' post from Bombay and as many more from Gwálior. It was not till comparison had been made by the head *munim* at Navalghar of the Gwálior and Bombay accounts that suspicion of fraud was first excited: enquiries were then set on foot and in January 1868, the conclusion was arrived at that the *hundis* were forgeries and that the firm had been made the victim of an extensive fraud. On the 25th January notice is sent by the plaintiffs' attorneys to the defendant that the *hundis* have been discovered to be forged documents and a refund is claimed from him. I do not think that there is any proof that the discovery of the forgery had been made so long, if at all, before this notice was sent, as to constitute laches on the part of the plaintiffs.

Lastly, it is said that the claim of refund was not made in proper form by the plaintiffs in their notice of the 25th January; indeed the plaintiffs merely announce the discovery of the forgery and claim a refund, adding expressions which show that they then entertained an opinion (which the evidence in this case shows to be wholly unfounded) that the defendant was mixed up in the fraud; but on the 4th of February 1868 (having in the meantime been informed that the defendant had "bought the *hundi* at Tanna, of one Kunyálál Johárimal-prasád") they then require that the defendant shall forthwith point out the said Kunyálál. Defendant contends, that, according to plaintiffs' own evidence as to the usage, they ought to have asked him to produce a duplicate or triplicate, a demand which, if made, he would have complied with, as he had

1869.

DAVLATRA'M SHRIRA'M *et. al.* *v.* BULA'KIDA'S KHEMCHAND.

taken the precautions of obtaining a duplicate from Kunyálál when he had purchased the *hundi* of him, and this duplicate defendant produced at the trial. This objection, I think proceeds from a misconception of the evidence as to what is requisite in the case of a *hundi* turning out to be *forged*, as distinct from stolen or lost. The substantial requisite in case of a forged *hundi* is that the drawer of the forged *hundi*, or the person of whom the forged *hundi* has been bought, should be pointed out. Thus the *munim* of Shivlál Motilál says, "The *sháh*, that is the person to whom the money has been paid, must point out the responsible party—if he does not he is responsible himself and must pay back the money;" and the old Indore *munim* of Ganeshdás Krishnáji said, "even if duplicate and triplicate be produced, yet, if it turns out that the *hundi* is a forgery, still the money ought to be refunded."

Now, the defendant candidly admits that he has made no attempts whatever (it would very likely have been nugatory if he had) to find out Prasád Behárimal of Mayárámpur or Kunyálál Joharimalprasád, merchant.

On the whole, considering that the weight of the evidence is in favour of the existence of the rule of customary law set up by the plaintiffs; considering that English law does not apply to the case; considering that the forgery has been substantially proved, sufficiently for the purposes of such a suit as this; and considering lastly, that the plaintiffs have not by acts or omissions disentitled themselves from sustaining their claim, I have come to the conclusion, though not without some difficulty and hesitation, that they are entitled to a decree, and I accordingly, on the only issue raised, record a finding in their favour, and pass a decree for the plaintiffs for Rs. 3,100 with interest thereon at six per cent. from 24th October 1867 till payment, but without costs.

Attorney for the plaintiff, *C. Tyabji.*

Attorneys for the defendant, *Dallas & Co.*

Original Suit No 840 *of* 1868

1869.
Jan. 16.

HODGSON *et al.* .....*Plaintiffs.*
RUPCHAND HAZA'RIMAL .....*Defendant.*

Evidence—Account Sales.

Where goods are consigned to be disposed of in a foreign market, it is an implied term of the agreement by the consignor that the account-sales furnished by the correspondents abroad shall be taken as *primâ facie* evidence of what the goods realised.

Held, that this was so even though the consignor objected to the correctness of the account sales when furnished to him.

THIS was a suit brought by K. D. Hodgson and others, composing the firm of Thomson, Finlay, and Co., of Liverpool, through their agents, Finlay, Scott, and Co., of Bombay. The defendant consigned to the plaintiffs two hundred bales of cotton for sale on his account, and drew upon the plaintiffs against the proceeds of the cotton to the amount of £1,900, the bills for which were in due course accepted and paid. At the time of consignment the defendant's *munim* signed a letter in which the following clause was contained :—" Should the net proceeds of the sale not cover the amount of the bills, I (defendant) authorise you to draw on me for the balance shown by your account-sales and account-current, which shall be absolute proof, in or out of Court, of sale and amount of loss ; and I agree to pay any balance shown therein at the expiration of the usance of the draft or drafts for the same."

Upon the sale of the cotton there was a deficiency, as shown by the account-sales and account-current, of £ 478-8-0. The account-sales and account-current were furnished to the defendant, together with a bill of exchange for the equivalent in rupees of the amount of the deficiency. This bill the defendant refused to accept, and the *munim* of the defendant stated that he refused to accept it on the ground that the weight of the cotton was not correctly given in the account sales.

1869.

HODGSON *et. al.* v. RUPCHAND HAZA'RIMAL.

There was conflicting evidence given at the hearing as to whether the letter which the defendant's *munim* signed had been read over, translated, and explained to him.

The defendant, in his written statement, alleged that the letter had not been read over to him; that the price obtained for the cotton was less than the market price ruling at the time of sale; and that the weight of the cotton sold was less than the weight of the cotton consigned. The case was tried by COUCH, C. J., on the 14th of January 1868.

Dunbar and *Macpherson*, for the plaintiffs, contended (1) that it was proved that the letter had been read over to the defendant's *munim*, and (2) supposing that not to be so, that the account-sales and account-current were, in the absence of proof to the contrary, sufficient for the Court to act upon, and cited 2 Ind. Jur. 5, and *Smith* v. *Blakey* (*a*).

Marriott and *Scoble* for the defendant.

Cur. adv. vult.

JAN. 16.—COUCH, C. J. :—This was a suit to recover the deficiency on a sale of cotton consigned by the defendant to the plaintiffs' firm in Liverpool, and the issues raised were—

(1) Whether the defendant agreed that the account-sales and account-current of the plaintiffs should be absolute proof, in or out of Court, of such sale and of the amount of loss thereon.

(2) Whether the plaintiffs are entitled to recover any, and what sum, from the defendant.

The witness who was called for the plaintiffs deposed distinctly that the letter from the defendant's firm to the plaintiffs, which contained the agreement, was read over to the defendant's *munim* before he signed it.

On the other hand, the *munim*, who was called for the defendant, stated that the letter was not read over to him, and that he did not know that it contained this clause.

(*a*) Law Rep. 2 Q. B. 326

It is not necessary for me to determine that issue, as I am of opinion that the account-sales is *primâ facie* evidence of what was realised by the sale of the cotton.

The law as to account-sales is, that where an account between merchants in different countries has been transmitted from one to the other, and no objection is made after several opportunities of writing have occurred, the account is deemed in a Court of Equity a stated account, only to be opened when some cause is shown for the interposition of the Court; and when goods are consigned to be disposed of in a foreign market, I think it must be considered that the consignor impliedly agrees that the account-sales furnished by the correspondents abroad shall be taken as *primâ facie* evidence of what the goods realised. It would cause great expense and inconvenience if the debtor, by merely objecting to the account, could compel the procuring evidence from abroad; and, seeing that in practice merchants are satisfied with the truth of the account-sales, and ask for no further evidence, I think there is a good ground for considering that there is such an implied agreement.

In this case the defendant's *munim* states that he did raise an objection when the account was first delivered to him; but, notwithstanding that, I think it is *primâ facie* evidence, on the ground I have stated. It showed the deficiency for which the suit is brought, and the defendant has not shown that it is incorrect.

With reference to the suggestion, on the part of the defendant, that the cotton was sold at less than the market price in England, Mr. Reid, a partner in Messrs. Finlay, Scott, & Co., gave evidence which is important. He stated that when the account-sales, &c., were received by his firm from England he saw them when they came to Bombay. They were at the market rate at that time. If they had not been so, he would have applied to the English firm for explanation. The defendant has not given any evidence that that was not the case. He has given some vague evidence as to the weight of the cotton, according to the

1869. HODGSON et. al. v. RUCHAND HAZA'RIMAL.

account-sales, being less than it ought to have been. He says he was present when it was weighed here, and has given the weights, and deducts twenty-five hundred-weights for tare; but there is no evidence to show that the weight of the cotton which was received by the plaintiffs in England was not as stated in the account-sales. I think it was necessary for the defendant to meet the *primâ facie* evidence of the account-sales by better evidence than has been given, and that the plaintiffs are entitled to recover the deficiency claimed.

On the second issue I find for the plaintiffs, and the judgment will be for the amount claimed, Rs. 5,168-4-0, and interest on Rs. 5,168-4-0 from the 4th of August 1868 to this date, at nine per cent. per annum, with costs and interest at six per cent. on the amount of the judgment.

Attorneys for the plaintiffs: *Acland, Prentis and Bishop.*

Attorney for the defendant: *Khanderav Moroji.*

Jan. 28.

Crown Side.

In the matter of GEORGE LEWIS, *Master of the Ship "Glen Tilt," and of* 17 *&* 18 *Vict., c.* 104.

***Shipping Master—Discharge of Seamen—Discretion—Merchant Shipping Act*—17 *&* 18 *Vict., c.* 104, *s.* 207**

The Shipping Master of Bombay has a discretion vested in him of refusing to sanction the discharge of a seaman, shipped from a foreign port, whose articles have not expired, though the seaman consents to such discharge.

ON the 16th of January 1869, *Dunbar*, before Couch, C. J., on behalf of George Lewis, master of the ship *Glen Tilt*, obtained a rule directing J. D. Freeman, Shipping Master of Bombay, to show cause why a writ of mandamus should not issue to compel him, J. D. Freeman, to discharge Frederick Whyte and two other seamen from the ship *Glen Tilt*, and to sign and attest a release of all claims between Frederick Whyte and the two other seamen and the master

1869.
In re.
GEORGE LEWIS.

of the ship, and to do all things necessary to complete the discharge of the said seamen.

The rule was granted on the affidavit of George Lewis, in which he stated that he took Frederick Whyte and the other two seamen on board the *Glen Tilt* at the port of London under articles as able seamen, about the 12th of August 1868, previous to the sailing of the *Glen Tilt* for Bombay; that the *Glen Tilt* arrived in Bombay harbour about the 7th of January 1869; that on the arrival of the *Glen Tilt* the seamen applied for their discharge, to which he consented; that on the 11th of January 1869 he attended with the seamen at the office of the Shipping Master, and, at the request of the seamen, applied for their discharge, but that the Shipping Master refused to grant the seamen their discharge, and did not assign any reason for his refusal; that at the time of making the application he produced the account of the seamen's wages, which he offered to pay, but the Shipping Master would not entertain the subject of the seamen's discharge except upon the terms that he (George Lewis) should engage other seamen in their stead within a week, to which terms he (George Lewis) declined to accede. The seamen also made a joint affidavit corroborating these facts.

George Lewis and the seamen went a second time, after giving notice, to the office of the Shipping Master, and with a like result.

Before the rule came on for argument, the Shipping Master filed an affidavit in which he stated the reasons for his refusal to discharge the seamen, which reasons he said he explained to George Lewis and the seamen when they came to his office. "I had," he stated, "a considerable number of distressed seamen then upon my hands chargeable to the State, and, therefore, I could not sanction the discharge of the seamen unless George Lewis would ship three other seamen in their place within four days, which he declined to do.

"I say that the three seamen were not entitled by their articles to be discharged in the port of Bombay.

1869.

In re. GEORGE LEWIS.

"I lastly say that on the 12th of January there were seventeen distressed seamen fed and supported at the expense of the State in Bombay, and that there then were a large number of unemployed seamen in Bombay liable to become chargeable to the State. Many of these unemployed seamen arrive in Bombay from various parts of Western India, and sometimes from Madras and Calcutta; and in the months of November and December last the subsistence bills paid by Government for the relief and support of distressed seamen amounted to Rs. 510-12-0 and Rs. 576 respectively."

The rule came on for argument before COUCH, C. J., and ARNOULD, J., on the 21st of January 1869.

The Honorable L. H. Bayley (Advocate General) showed cause. The case of the *Milton* (*a*), which was relied upon when the rule *nisi* was granted, cannot be supported. It was not argued, as counsel for the Shipping Master gave up the point. Here the facts stated in the affidavit of Mr. Freeman show that he has exercised a sound discretion in refusing the discharge of the seamen: the only question, therefore, is, has the Shipping Master any discretion in the matter. I contend that he has. The solution of this question depends upon the construction to be put upon sec. 207 of the Merchant Shipping Act of 1854 (*b*), a section contained in Part III. of the Act, and, therefore, by sec. 109, applicable to all sea-going British ships, of which the *Glen Tilt* is one. Sec. 207 enacts that if the master of any British ship discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped) without previously obtaining the sanction in writing, endorsed on the agreement, of some public Shipping Master, or other officer duly appointed by the local Government in that behalf, he shall for such default be deemed guilty of a misdemeanour; and the said functionaries shall examine into the ground of such proposed discharge * * * in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction,"

(*a*) Ind. Jur. N. S. 371 (*b*) 17 & 18 Vict., c. 104

1869.
In re.
GEORGE
LEWIS.

&c. These provisions have a twofold object—(1) the protection of the seaman in respect of the contract he has entered into; (2) the protection from being overrun with discharged seamen of the possession where such seaman may be discharged. The Act contains no preamble, it being a consolidating Act: we must, therefore, have recourse to the preambles of the Acts which it consolidates for the explanation of anything that may be ambiguous in its terms. By 5 & 6 Wm. IV., c. 19, s. 40, it is enacted that "whereas great mischiefs have arisen from masters leaving seamen in foreign parts, who have thus been reduced to distress, and thereby tempted to become pirates &c.," that the forcing on shore, or leaving behind, a seaman in such places shall be a misdemeanour; and by sec. 41 seamen are not to be discharged without the sanction of certain functionaries, who are thereby given the same powers as are now conferred by sec. 207 of the Merchant Shipping Act, 1854. The same preamble is to be found in 7 & 8 Vict., c. 112, s. 46. That Act has been repealed by 17 & 18 Vict., c. 120, but the same reasons that then operated operate still: therefore, the provisions of that Act are re-enacted in the section we are considering. These preambles clearly show that the Legislature had in view the protection of the colonies as well as of the seamen. This construction is borne out by the rules published by the Board of Trade in pursuance of the powers given it by the Act (*c*). Besides, the latter portion of the section in question clearly shows that the Shipping Master has a discretion;

(*c*) Rule 12:—"As great evils have arisen from British seamen being left destitute in foreign ports, and as great expense is incurred by the Government in relieving them and sending them home, very stringent provisions are made to prevent their being so left, except in cases of necessity, and unless due precautions are taken for their return to their native country. The degree of stringency with which certain of these provisions should be enforced must depend in some degree upon the circumstances of the case. Thus in a colony where demand for labour is great, there is comparatively little fear that able-bodied seamen, if left behind, will become destitute, and the reason for objecting to their discharge will not apply to the same extent as in countries where they will probably become a burden to the public resources. While, therefore, the provision of the Act must be observed in all cases, it must rest with the local authorities to determine the mode and extent in and to which the powers given by the Act are to be exercised."

1869. *In re.* GEORGE LEWIS.

for otherwise why should he examine into the *grounds* of the proposed discharge?[11] He also cited Reg. I. of 1820, and Browne's Collection of Acts and Regulations, p. 20; Act XIII. of 1856, Schedule of Laws repealed; Act I. of 1859; 13 & 14 Vict., c. 93, s. 76; Abbott on Shipping, ed. of 1847, pp. 169 to 172, omitted in last edition.

Pigot (with him *Dunbar*), in support of the rule:—The point is undoubtedly a nice one, but it is concluded by authority. The decision of Phear, J., in the case of the *Milton* did not turn on the particular facts of that case, but is general in its application, and the arguments upon which his decision is founded are strong. Looking at the Act, there is no ground for supposing that it was intended to protect the seamen against their own improvidence, or to protect the colonies. Its object is to protect the seamen in respect of the contract they have entered into. The omission of preambles they contained in former Acts, and of the texts to the same effect from text-books, shows that this is so. The object of the Act seems to be to protect seamen from arbitrary discharge, which is necessary, seeing the enormous powers of masters in foreign ports. Such protection is not required in a seaman's own domicile: therefore, the exception is introduced into the clause. If the object contended for on the other side were contemplated, there should be a clause to prevent seamen from shipping for the outward voyage only. In that case the Shipping Master must discharge; why not in this? How can it matter whether the consent of the sea-

11. "Whenever the master of any British ship discharges or leaves behind at any place, in any colony or British possession abroad, except that in which he was shipped, any person belonging to his ship, he must apply to the officer appointed for the purpose. The officer will then inquire into the grounds of the proposed discharge, or into the grounds on which the man is to be left behind, and may, if he thinks it necessary, administer oaths for that purpose.

15. "The steps to be taken in cases of desertion are mentioned below. * * * In all other cases in which men are left behind, the sanction of the officer must be obtained before the discharge can be effected. For considering the propriety of granting or withholding his sanction the officer will be guided by the rules of law by which the relations between master and seamen are governed, and if questions of difficulty arise they may be determined by an appeal to the courts of law."

1869.

In re. GEORGE LEWIS.

man to be discharged in Bombay is given at home or here? The wording of the Act at present in force is different from that of the preceding Acts. In 5 & 6 Wm. IV., c. 19, s. 41, after the words "shall grant or refuse such sanction" follow these expressive words: "*according to their discretion*, having regard to the objects of this Act;" and in 7 & 8 Vict., c. 112, s. 46, the phrase is shall grant or refuse such sanction *according to the circumstances*, and as it shall appear to them to be just;" whereas in the section in question the words used are "shall grant or refuse such sanction, as appears to them to be just," thus plainly showing an intention on the part of the Legislature to narrow the circumstances under which a discharge may be refused."

Cur. adv. vult.

Jan. 28.—COUCH, C. J. (after stating the facts of the case, proceeded):—

The question we have to determine is, whether under these circumstances the Shipping Master has any discretion, and is not bound to sanction the discharge.

The words of sec. 207,—"discharges any seaman without previously obtaining the sanction in writing, endorsed on the agreement, of some public Shipping Master or other officer duly appointed by the local Government in that behalf"—are general, and, according to their ordinary meaning, would enable the Shipping Master to exercise a discretion. But it is argued that the latter part of the section—"and the said functionaries shall, and the said merchants may, examine into the grounds of such proposed discharge, and may either grant or refuse such sanction or certificate as appears to them to be just,"—shows that the intention of the Legislature was only to protect the seaman from a wrongful or improper discharge, and that where the seaman freely consents to his discharge the Shipping Master is bound to sanction it.

By the 5 & 6 Wm. IV. c. 19, s. 40, it is recited, "And whereas great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have been

1869.

In re. GEORGE LEWIS.

thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf," and it is enacted "that if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind, on shore or at sea, in any place in or out of His Majesty's dominions, any person belonging to his crew, he shall be deemed guilty of a misdemeanour." And by sec. 41—"that no such master shall discharge any individual person of his crew, whether British subject or foreigner, at any of His Majesty's colonies or plantations, without the previous sanction in writing of the Governor, Lieutenant-Governor, Secretary, or other officer appointed in that behalf by the Government there, or, in the absence of all such authorities at or near to the port or place at which the ships shall be then lying, then of the chief officer of customs of such colony or plantation resident at or near to such port or place, nor shall he discharge any such person at any other place abroad without the like previous sanction in writing of His Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants resident there, all which said functionaries respectively are hereby authorised and required, and all which said merchants are hereby authorised in a summary way to inquire into the grounds of any such proposed discharge by examination on oath, and thereupon to *grant or refuse such sanction, according to their discretion, having regard to the objects of this Act.*"

Not only do the words of this section expressly show an intention that the functionaries named should exercise a discretion in granting or refusing the sanction in all cases; but also, as the discharging a seaman without his consent, and without sufficient cause, before the completion of the voyage for which he had been engaged, might come within the terms of sec. 40, and the mischiefs referred to are public mischiefs, it may be inferred that sec. 41 was intended to include a discharge with the consent of the seaman. Sec. 13

makes this still more clear. That enacts "that if any such master shall leave behind any one of his crew as aforesaid, contrary to this Act, in any indictment or proceeding the proof of his having obtained such sanction or certificate shall be upon him, it being the intention hereof that, except in the case of entering into His Majesty's naval service, no person of the crew shall be discharged, either *with or without his consent*, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto."

The Act 5 & 6 Wm. IV., c. 19, was repealed by the 7 & 8 Vict., c. 112, which is entitled "An Act to amend and consolidate the laws relating to merchant seamen, and for keeping a register of seamen." Sec. 46 of this Act contains the same recital as is in sec. 40 of the repealed Act, and then enacts "that if any master of a ship belonging to any subject of Her Majesty shall discharge any person belonging to his ship or crew at any of Her Majesty's colonies or plantations without the previous sanction in writing (to be endorsed on the agreement) of the Governor or other officer holding the chief authority there, or of the Secretary or other officer duly appointed by the Government there in that behalf, or in the absence of such functionaries then of the chief officer of customs resident at or near such port or place, or shall discharge any such person at any other place abroad without the like previous sanction, to be endorsed on the agreement by Her Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants resident there, such master shall be guilty of a misdemeanour; or if any master of any such ship shall abandon or leave behind at any such colony or plantation any person belonging to his ship or crew, on the plea or pretence of unfitness or inability to proceed upon the voyage, or of desertion or disappearance from the ship, without a previous certificate in writing (to be endorsed on the agreement) of the Governor, Secretary, or other officer as aforesaid, or in the absence of such functionary then of the chief officer of customs resident at or near such port or place, certifying such unfitness,

1869.
In re.
GEORGE LEWIS.

inability, desertion, or disappearance, or shall abandon or leave behind any person belonging to his ship or crew at any other place abroad, on shore or at sea, upon such plea or pretence, without the like previous certificate of Her Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants, if there be any such at, or within a reasonable distance from, the place where the ship shall then be, such master shall be guilty of a misdemeanour; or if any master of any such ship, in case any person belonging to his ship or crew shall desert from the said ship at any place abroad, shall neglect to notify the same in writing to one of such functionaries as aforesaid, if there be any such resident at or near the place, and in their absence, if it be out of Her Majesty's dominions then to two respectable merchants, if there be such at or near the place, within twenty-four hours of such desertion, such master shall be guilty of a misdemeanour; and the said functionaries are hereby authorised and required, and the said merchants are authorised, to examine into the grounds of such proposed discharge, or into the plea or pretence of such unfitness, inability, desertion, or disappearance, as aforesaid, in a summary way, upon oath (which oath they are hereby respectively authorised to administer), and to grant or refuse such sanction or certificate, according to the circumstances, and as it shall appear to them to be just."

In sec. 11 of the repealed Act the words were "according to their discretion, having regard to the objects of this Act;" but we think this change of expression is not enough to indicate an intention that in the case of a discharge with the consent of the seaman there was not to be any discretion. In a consolidating and amending Act the mere change of phraseology is not to be construed as a change of the law, unless it evidently purports an intention to work a change. And probably the change may have arisen from the draftsman having in the new Act included in one section what was provided for by secs. 41 and 42 of the repealed Act, the latter of which required a certificate in writing in the case of incapacity to proceed on the voy-

1869.

In re. GEORGE LEWIS.

age, desertion, or disappearance. By sec. 17 it is also made a misdemeanour, as it was in the repealed Act, "wrongfully to force on shore and leave behind, or otherwise wilfully and wrongfully to leave behind, in or out of Her Majesty's dominions, any person belonging to the ship or crew before the completion of the voyage;" and sec. 48 makes it incumbent on the master, in any information, indictment, or other proceeding against him, to produce or prove the sanction, whether the discharge was *with or without the consent* of the seaman. This provision seems to be inconsistent with an intention that where the discharge was *with consent* the functionary was bound to sanction it.

This being the state of the law, the Act 17 & 18 Vict., c. 104, upon which the question before us arises, was passed. It enacts that it is expedient to amend and consolidate the Acts relating to merchant shipping; and so much of the 5 & 6 Wm. IV., c. 19, as was not already repealed, and the whole of the 7 & 8 Vict., c. 112, are repealed. In this Act there is a series of sections, 205 to 213, headed "Leaving seamen abroad," one of which, 211, provides for the relief and sending home at the public expense of seamen, being subjects of Her Majesty, who have been shipwrecked, *discharged*, or left behind at any place abroad, re-enacting what was the law by the repealed Acts 11 Geo. IV., c. 20, s. 82, and 7 & 8 Vict., c. 112, s. 52. Of this series of sections, sec. 206 provides, as 7 & 8 Vict., c. 112, s. 47, did, for the wrongfully forcing a seaman on shore and leaving him behind, or otherwise wilfully and wrongfully leaving him behind, in any place, in or out of Her Majesty's dominions; and sec. 207 enacts that if the master of any British ship does any of the things stated,—one of which is "discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing, indorsed on the agreement, of some public Shipping Master or other officer duly appointed by the local Government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place," he shall for each such default be deemed guilty of a misde-

1869.

In re. GEORGE LEWIS.

meanour; and then follow the words which were much relied on in support of this application—"and the said functionaries shall, and the said merchants may, examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate, as appears to them to be just."

In the Act now in force there is no recital, as in the former Acts, of great mischiefs having arisen from leaving seamen in foreign parts. It was probably not thought necessary to repeat this, the law having been in force for many years; but the necessity for preventing these mischiefs still continued; and, when we find the Legislature re-enacting the provisions of the repealed Acts, it may reasonably be inferred, notwithstanding some change in the language, that they were intended to have the same operation. It would require a plain indication of a contrary intention to justify the Court in putting a different construction upon them. The argument that the law is intended only for the benefit of the seaman, and to protect him from a wrongful or improper discharge, we think, fails, when we consider that the mischiefs are of a public nature, and also that a discharge in the possession in which he was shipped is excepted. The law seems to be intended to prevent the public mischiefs, and as a provision is made for the seaman being relieved and sent home at the public expense when discharged, it is reasonable that the power of terminating the contract by mutual consent, and giving him a right to relief, should be subject to some control.

Looking at the previous legislation on the subject, and at the policy as well as the language of the Act now in force, we are of opinion that the Shipping Master had a discretion in this case, and we are unable to concur in the view which Mr. Justice Phear took of sec. 207. The rule must be discharged; but, as the case of the applicant was supported by the opinion of a learned Judge of the High Court at Calcutta, we think it should be without costs.

Rule discharged.

Referred Case.

1869.
March 18.

THOMAS SHORTT, junior, *et al*..... *Plaintiffs.*
A'BDU'L RAHIMA'N .....*Defendant.*

Jurisdiction—Small Cause Court—Payment—Set off—A Consignor has no right to credit a Consignee with the proceeds of a sale of goods not accepted.

The plaintiffs consigned goods to the defendant, and drew a bill for Rs 2,711-9-6 against them on the defendant in favour of the Chartered Mercantile Bank. The bill was accepted by the defendant, and, when presented for payment, was dishonoured.

The bill was paid for honour by the attorney of the plaintiffs. The goods arrived, and (the defendant having refused to pay the bill) were sold by the plaintiffs, after notice to the defendant, at his risk, and realised Rs. 1,655-15-4. The plaintiffs refused to hold a survey on the goods unless the defendant paid the amount of the acceptance.

The plaintiffs sued the defendant in the Small Cause Court, for the amount of his acceptance giving him credit for the proceeds of the goods, and abandoning the excess.

Held, that the plaintiffs were not entitled to do so, as the claim on the bill was not brought within the jurisdiction of that Court by payment or admitted set-off.

CASE stated for the opinion of the High Court, under sec. 55 of Act IX. of 1850, and sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes :—

"In this case the plaintiff in the summons, as originally framed, sought to recover from the defendant the sum of Rs. 930-10-2, being the balance alleged to be due to the plaintiff by the defendant on a certain bill of exchange, drawn on the defendant by the plaintiff and accepted by the defendant, for the sum of (including noting charges and interest) Rs. 2,711-9-6, after giving credit to the defendant for the proceeds of certain goods, against which the said bill was drawn, and which goods, it was alleged, the defendant refused to accept, Rs. 1,655-15-4; and for a sum of Rs. 125, which the plaintiff alleged was due by him to the defendant in respect of a certain agreement between them, making in all the sum of Rs. 1,780-15-4, for which the plaintiff was willing to give credit to the defendant.

"The defendant first pleaded that the Court had no jurisdiction in the case, inasmuch as the said sum of Rs. 125, for

1869.

THOMAS SHORTT *et al.* v. A'BDU'L RAHIMA'N.

which the plaintiff sought to give credit to the defendant was not a payment on account, or an admitted set-off, and could not be used to bring the plaintiff's claim below the sum of Rs. 1,000.

"The plaintiff then proposed to amend his statement of the particulars of his claim by striking out the sum of Rs. 125, and suing for Rs. 1,055-10-2, and abandoning the excess.

"I allowed the amendment.

"The defendant did not apply for any postponement of the case on the summons being so amended, but contended that this Court, having held that the summons, as it originally was framed, disclosed a cause of action beyond its jurisdiction, had no power to make the amendment aforesaid.

"I overruled this objection, and proceeded with the hearing of the case.

"The facts were, that the defendant had ordered certain goods of the plaintiff, and the plaintiff had drawn on the defendant, in favour of the Chartered Mercantile Bank of India, London, and China, a bill of exchange against the said goods, which had been duly accepted by the defendant.

"This acceptance, having become due on the 28th of January 1868, was duly presented for payment to the defendant and protested for non-payment; and the attorney of the plaintiff, having paid the amount of the acceptance to the Chartered Mercantile, Bank, for the honour of Shortt & Co., now sued the defendant in the name of his principal.

"The defendant having refused to pay the acceptance, the goods against which it was drawn having arrived were, after notice to the defendant, sold at his risk, and realised a net amount of Rs. 1,055-15-4.

"From the evidence, and correspondence between the parties which was put in evidence, it appeared that the defendant had purchased the goods in question by a sample, and objected to take delivery of the goods, alleging that he believed them to be inferior to the sample, and that the

plaintiff refused to hold a survey until the defendant paid the amount of the acceptance, and that the defendant based his opinion, that these goods were inferior to the sample, on the fact that other goods of a similar kind had recently been received by him from the plaintiff, which were inferior to the sample, and in respect of which the plaintiff had made him an allowance.

"I was of opinion that the defendant was liable on his acceptance, and that the plaintiff was entitled to give credit for the amount realised by the sale of the goods, and I found for the plaintiff for Rs. 1,000 and costs, and I certified the plaintiff's advocate's costs, subject to the opinion of the High Court, as requested by the defendant, on the following points:—

"(1) Had I power to make the amendment mentioned after coming to the conclusion that the case, as originally framed, was beyond my jurisdiction.

"(2) Was the case after such amendment within the jurisdiction of this Court.

"(3) Whether the plaintiff, having refused to hold a survey of the goods which had been sold by sample, was entitled to sell them at the risk of the defendant and set off the amount realised in the present action.

The case was argued before COUCH, C.J., and WESTROPP, J., on the 18th of March 1869.

Pigot and *Mayhew* for the plaintiffs.

They contended that the case was governed by *Ewart, Latham, & Co.* v. *Háji Muhammad* (*a*); that there was an implied authority given by the defendant to the plaintiffs to sell the goods on his account, the property in them having passed to the defendant. They cited Chitty on Contracts, p. 390, l; Tit. "When Vendors may resell," and *Maclean* v *Dunn* (*b*).

M'Culloch (with him *Branson*), for the defendant:—This is not a mere question of form, but goes to the merits of the

(*a*) 4 Bom. H. C. Rep., O. C. J. 133. (*b*) 4 Bing. 722.

1869.

THOMAS SHORTT et al. v. A'BDU'L RAHIMA'N.

case. If the plaintiffs are to be allowed to sue on the bill, giving credit for the proceeds of the goods, it throws upon the defendant the *onus* of proving that the goods were not according to the sample, which it is impossible for him to do, as he was not allowed to hold a survey on them; whereas if the plaintiffs sue for damages, they will have to show that the goods were such as the defendant was bound to accept. The property in the goods did not pass to the defendant, and the claim of the plaintiffs is not for goods bargained for and sold, but for damages: *Lamond* v. *Davall* (*c*). If this is anything but a claim for damages, it is a set-off; but a set-off must be acknowledged: *Avards* v. *Rhodes* (*d*). The case of *Ewart, Latham, & Co.* v. *Háji Muhammad* is easily distinguished. The plaintiffs there were the defendant's agents to sell, and they were authorised to apply the proceeds in liquidation of their claim against the defendant. He also cited *Woodhams* v. *Newman* (*e*), and Bullen and Leake on Pleading, p. 446.

Mayhew in reply.

COUCH, C. J.:—In this case the learned Judge of the Small Cause Court states that the facts were as follows [His Lordship read the case], and then the Judge says that he was of opinion that upon these facts he had jurisdiction to try the case.

Now the second question put goes to the root of the matter, and if we are of opinion that that must be answered in the negative, it will not be necessary for us to answer the third or the first. The suit in the original and amended plaint is on a bill of exchange for Rs. 2,711-9-6, and the balance is arrived at by giving credit for the sum of Rs. 1,055-15-1, which was the amount produced by the sale of the goods. Unless the plaintiffs were entitled to do that, the suit was not within the jurisdiction of the Court. I think the learned Judge was wrong in holding that the plaintiffs were entitled to give credit to the defendant for that

(*c*) 20 Q. B. 103. (*d*) 22 L. J. Ex. 106.
(*e*) 7 C. B. 651; 18 L. J., C. P. 213.

1869.

THOMAS SHORTT et al. v. A'BDU'L RAHIMA'N.

sum. According to the case of *Avards* v. *Rhodes*—which has not been, as far as I know, overruled, nor have I any reason to doubt the authority of the decision in it—in order to bring a claim within the jurisdiction of the Small Cause Court there must be a payment or an admitted set-off. The plaintiffs cannot bring their claim within the jurisdiction by offering to give credit for any sum they may choose to allow.

In this case I think the defendant neither expressly nor impliedly authorised the plaintiffs to sell the goods, and apply the proceeds in reduction of their claim upon the bill, nor did he assent to that being done. The facts show that so far from his doing that, he was disputing his liability to pay the bill, as the goods did not agree with the sample. He certainly did not assent to that course of conduct on the part of the plaintiffs, nor would the law give power to the plaintiffs to sell on behalf of the defendant goods, which were those of the plaintiffs themselves and which it does not appear whether the defendant was, or was not, bound to accept.

No doubt, the plaintiffs, if they thought fit to sell the goods might do so, and might treat the amount realised by the sale as the measure of their damages in an action for not accepting. But that is not what they have done. They have sold the goods as the goods of the defendant, and they sue on the bill, and set off the proceeds of the goods against it and take advantage of that to avoid the necessity of bringing an action for not accepting the goods.

If they sue upon the bill in the Small Cause Court, they must reduce its amount so as to bring it within the jurisdiction of that Court by payment or admitted set-off. They may sue in this Court on the bill, or, if anxious to sue in the Small Cause Court, they may sue there for not accepting the goods; but their position in that case would be different, for the *onus* would lie upon them of proving that the goods were equal to the sample. It is not, I think, a matter which goes merely to the form of the action, and the plaintiffs have no reason to complain if they are held bound to show that the balance they sue for is brought within the jurisdiction of the Court by payment or admitted set-off.

1869.

THOMAS SHORTT et. al. v. A'BDU'L RAHIMA'N.

The second question must, therefore, be answered in the negative, and judgment be given for the defendant, on the ground that the claim of the plaintiffs is not within the jurisdiction of the Court; but, as the plaintiffs, had the opinion of the learned Judge in their favour, each party should bear his own costs of this application.

WESTROPP, J.—I agree with the Lord Chief Justice in thinking that in this case the learned Judge of the Small Cause Court had not power, either on the original or the amended summons, to entertain the case. I say nothing as to his power to make the amendment.

Till it is shown to us that the case of *Avards* v. *Rhodes* is overruled, we ought, I think, to follow that case.

The present case is different from *Ewart, Latham, & Co.* v. *Háji Muhammad Siddík* (*ubi suprà*), and the difference consists in this, that we there held that the proceeds of the goods were agreed to be applied in part payment; there was authority from both parties to a common agent to sell the goods, and apply the proceeds obtained in payment of the purchase money. Here there was no authority on the part of the defendant to the plaintiffs to sell the goods; their doing so was an act of their own. They are not thereby authorised to set off the amount realised in reduction of the bill, and so bring the case within the jurisdiction. That they could only do if there were a set-off admitted by the defendant. That it is not so admitted is plain, for the defendant says he was not bound either to accept the goods, or pay anything in respect of the bill.

Original Suit No. 818 *of* 1868. 1869. April 22.

MANCHARJI SORA'BJI CHULLA' .....*Plaintiff.*
KONGSEOO *et. al.* .....*Defendants.*

Constructive Notice—Purchaser for Value—Tenant in Possession—Charitable Trust—Person in Possession as the object of a Charitable Trust.

If the purchaser of an estate for value takes with notice, actual or constructive, of a trust, he is bound by such trust to the same extent and in the same manner as the person from whom he purchased.

A person purchasing an estate where there is a tenant in possession is bound to inquire into the title of such tenant, and if he neglects to do so he takes subject to such rights as the tenant may have.

The equities are the same where there is a person in possession as the object of a charitable trust and under the trust.

THE facts of this suit sufficiently appear from the judgement of the Court.

The case was tried by COUCH, C.J., in the First Division Court. The hearing concluded on the 6th of March, having occupied several days.

White and *Marriott* for the plaintiff.

Dunbar and M'Culloch for the defendants.

Cur. adv. vult.

April 22. COUCH, C.J.—This was a suit by a mortgagee to recover possession of a house and land situate to the north of the Erskine Road in Bombay, of which the defendants were the occupiers.

For some time previous to 1859 the premises belonged to Bibí Sáheb, of whom they were purchased by four persons, Walter Johnson, Hoongee Jackson, Vanghoo Athavoo, and Chinjun Cooeson, and were conveyed to them by a deed dated the 1st of June 1859. On the 11th of February 1861 those four persons mortgaged the premises to Muhammad bin Abdullá bin Farrah for Rs. 3,000, and on the 8th of April 1863 the premises were conveyed to Sonábái, the widow of Hormasji Jamsetji, in mortgage, to secure Rs. 5,000,

1869.

MANCHARJI SORA'BJI CHULLA' v. KONGSROO et. al.

part of which was applied in paying off the previous mortgage. On the 11th of August 1866 the property was put up for sale by public auction by Sonúbái, under a power of sale contained in the deed of mortgage, and Hoongee Jackson and one Appung Thuckwan became the purchasers at the price of Rs. 7,000. The premises were conveyed to them by Sonúbái by a deed dated the 3rd of January 1867, and on the same day they mortgaged them to the plaintiff to secure the sum of Rs. 6,000, which was paid to Sonúbái in part payment of the purchase-money. The plaintiff has shown a legal title to the possession of the premises; but the defendants allege that they were purchased for the purpose of devoting them as an asylum for poor and destitute Chinese inhabitants of Bombay, and for a temple for their Chinese deities Konkon and Oonchoo; that the purchase-money was raised by subscriptions, and the conveyance was made in the names of Walter Johnson, Hoongee Jackson, Vangoo Athavoo, and Chinjun Cooeson, who were old Chinese inhabitants of Bombay; and that they were trustees of the premises for the Chinese community of Bombay, and the defendants were in occupation, as being poor members of the Chinese community. The questions which have to be determined are, therefore, whether the premises were held by Walter Johnson and the three others upon trust for charitable purposes, as alleged; and whether the plaintiff is bound by the trust. [His Lordship here reviewed the evidence upon which he came to the conclusion that the premises were held upon trust for the charitable purposes alleged, and proceeded.]

It is necessary, therefore, to determine the second question. The established doctrine of Courts of Equity is, that if a purchaser of an estate at its full value takes with notice of a trust, he is (subject to the protection afforded by the statutes of limitation) bound to the same extent and in the same manner as the person of whom he purchased: for, knowing another's right to the property, he throws away his money voluntarily and of his own free will. And this applies equally to a mortgagee, who is *pro tanto* a purchaser: *Jones* v. *Smith*

(*a*). The doctrine is applicable to charities in the same manner as between private persons, with, it seems, an exception in favour of charities; for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of the charity. Also if the trustee sell the land to a *bonâ fide* purchaser without notice, and afterwards himself becomes the owner of the lands, though for a good, and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust.

Notice is either actual or constructive; and in this case the Court has to consider what amounts to constructive notice. This is not an easy matter, for much depends upon the circumstances of each particular case. What is sufficient to put a purchaser upon inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed cognisant of it. In Equity it is sufficient to charge a man with knowledge that he had that before him, which, if he had used due diligence, would have afforded the knowledge he desires: *Spackman* v. *Evans* (*b*).

There are many decisions of Courts of Equity where this rule has been applied; but I shall only refer to those which are in their circumstances most like the case before me. In *Taylor* v. *Stibbert* (*c*) Lord Rosslyn said: "I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined, that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with

(*a*) 1 Hare 43.
(b) Law Rep. 3 E. & I. App. 221, per Lord St. Leonards
(*c*) 2 Ves Jun. 437, 440.

1869.

MANCHARJI SORA'BJI CHULLA' v. KONGREGO. et. al.

whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent and terms of which it was his duty to inquire." In *Jones* v. *Smith* (*d*) Vice-Chancellor Wigram says: "First, it was said that if a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land. I do not dispute this proposition: *Allen* v. *Anthony*, *Daniels* v. *Davison*, *Taylor* v. *Stibbert*; for possession is *primâ facie* evidence of a seisin in fee." In *Daniels* v. *Davison* (*e*) the Lord Chancellor held that where there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession; that a tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession. In *Allen* v. *Anthony* (*f*), quoted by Vice-Chancellor Wigram, the Lord Chancellor said: "It is so far settled as not to be disputed that a person purchasing, where there is a tenant in possession, if he neglects to inquire into the title, must take subject to such rights as the tenant may have." Although *Daniels* v. *Davison* has always been considered an extreme case, beyond which the doctrine ought not to be extended, it has to that extent been repeatedly acted upon: *Bailey* v. *Richardson* (*g*); *Barnhart* v. *Greenshields* (*h*); *Knight* v. *Bowyer* (*i*). I am not aware of any decision where the doctrine has been applied to the case of a person being in possession as the object of a charitable trust and under the trust; but I can see no difference in principle between this and the possession of a tenant, as the duty to make inquiry arises from the fact that the estate is not in the actual possession of the vendor. There is the same equity in both cases. I think it is clear, upon the evidence

(*d*) 1 Hare 60.

(*e*) 16 Ves. 249; S. C., 17 Ves. 433. (*f*) 1 Mer. 282.

(*g*) 9 Hare 731 (*h*); 9 Moo. P. C. C. 18 (*i*) 23 Beav. 609.

in the suit, particularly that of Walter Johnson, that at the dates of all the transactions subsequent to the purchase from Bibi Sáheb, the premises were not in the occupation of the mortgagors or vendors, and there was in each case sufficient to put the mortgagee or purchaser upon inquiry. The advertisements in the newspapers previous to the mortgage to Sonábái, in April 1863, cannot be considered such an inquiry as the mortgagee was bound to make. Nor would the publicity of the sale in 1866 render it unnecessary. If a purchaser does not think fit to make inquiry, he must take the risk of persons not having made an objection to the sale. Upon the circumstances of this case I am of opinion that Muhammad bin Abdullá, Sonábái, Appung Thuckwan, and the plaintiff were all bound by the trust; I need not determine to what extent the trust revived upon the purchase in 1866 by Hoongee Jackson and Appung Thuckwan, whether as to the whole of the property, or only half, the conveyance being to them as tenants in common. If upon the circumstances Appung Thuckwan cannot be held to have had constructive notice, neither can the plaintiff; and, although the trust might have revived as to the whole, he would be a purchaser without notice. The result of my judgment is, that the plaintiff is not entitled to the relief which he seeks in his plaint, namely, to recover possession of the premises from the defendants, and I decree accordingly, and that the plaintiff pay the costs of the suit.

Attorneys for the plaintiff: *Dallas & Co.*

Attorney for the defendants: *Khanderáv Moroji.*

1839.
August 2.

In re INDIAN REGISTRATION ACT 1866, *and in the matter of the petition of* GANP'AT M'ANIKJI PA'TI'L.

Registration—Bond—Instalment—Agreement that on non-payment of interest the whole debt should become due—Act XX. of 1866, *secs.* 52 *and* 53.

A bond payable two years after date, contained a stipulation that in case of default being made in payment of interest on the principal sum secured, the principal sum, with interest up to the due date of the bond, should at once become payable. The bond was specially registered under sec. 52 of the Indian Registration Act 1866.

Held, that such an agreement did not come strictly within the words of secs. 52 and 53 of the Act and could not, therefore, be summarily enforced by petition under sec. 53.

THIS was an application made to Westropp, J., in Chambers, on the 22nd of July 1869, under sec. 53 of the Indian Registration Act, 1866, for an order to draw up a decree in favour of the petitioner and against the defendants for Rs. 8,400 and costs.

The petition, upon which the order was sought, stated, that the defendants, on the 8th of April 1868, executed a mortgage deed to secure payment to the petitioner of the principal sum of Rs. 7,000 and interest, and thereby covenanted with the petitioner to pay him the said sum of Rs. 7,000 on the 8th of April 1870, and to pay interest thereon at the rate of Rs. 1 per cent. per mensem monthly, and further agreed that, in default of payment of any one instalment, the whole amount of principal, and interest thereon up to the 8th of April 1870, should be paid at once.

That, endorsed on the mortgage bond, was an agreement in the following words. "It is agreed between Tulsirám Vittoji, Rámji Vittoji, and Bhikaji Vithoji, the obligors, and Gánpat Máṇikji, the obligee of the above obligation, that, in the event of the obligation not being duly satisfied, the amount secured thereby may be summarily recovered in the manner prescribed in sec. 53 of the Indian Registration Act 1866." The deed, with the above endorsement, was duly registered on the 8th April 1868.

1869.

In re GANPA'T MA'NIKJI PA'TI'L.

That default in payment of the interest having been made, the whole amount of principal and interest thereunder became due on the 8th of September 1868; that demand for payment thereof was made upon the defendants, but that they did not pay the same or any part thereof, and that, at the date of the presentment of the petition, there was due on foot of the mortgage the sum of Rs. 7,000, as principal, and Rs. 1,400 as interest calculated up to the 8th of April 1870.

Mr. Green, of the firm of Macfarlane and Green, appeared for the plaintiff.

WESTROPP, J., took time to consider whether he would make the order prayed for, and on the 2nd of August rejected the petition, saying:—

When this petition was presented to me, I expressed a doubt to Mr. Green, as to the case stated in it falling within sec. 53 of the Indian Registration Act of 1866. In order to entitle the mortgagee now to recover the whole amount of principal, and interest up to the 8th of April 1870, it would be necessary for him to produce evidence, beyond the mortgage deed itself, to show default in payment of one of the monthly instalments of interest payable by the mortgagor. A somewhat similar petition (*a*) was lately presented to Phear, J., in Calcutta, upon a Bengali bond, stipulating that the principal secured thereby should be payable by instalments, and that, in case of default in payment of any two successive instalments, the whole amount secured should become due. Phear, J. refused to receive the petition, because it could not be known, without evidence, besides the deed, whether or not the contingency had happened, upon the occurrence of which the whole debt sought to be recovered became due. He thought the summary remedy, given by sec. 53 of the Act, did not apply, when the plaintiff's claim required other proof than that furnished by the registered deed. That decision was affirmed on

(*a*) 11 Calc. W. Rep. App. Ord. Civ. Jur. 24, 25, 26; S. C. 2 Beng. L. R. Orig. Jur. Civ. 151 (In re Luchmiput Sing Dogar Roy Báhádur).

1869.

In re GANPA'T MA'NIKJI PA'TI'L.

appeal; Peacock, C. J., said: 'There are two classes of cases mentioned in the section; one where the whole amount becomes due; and the other where any instalment, when the amount is payable by instalments, becomes due; but the third case is not mentioned, viz., where the *whole amount* of the bond becomes payable by reason of an instalment not having been paid.' He adds, 'the petitioner might produce ten witnesses to show that it had not been paid, and the defendant ten witnesses to prove that it had. In that case, if the evidence were gone into in a suit for the whole amount of the bond, there is no doubt that an appeal would lie, if the case were tried by a single Judge; but if the case comes within the Registration Act, no appeal would lie if the Judge should decide that the instalment had not been paid (*b*). It appears, therefore, to me that we ought not to extend the meaning of sec. 53, which gives a summary remedy without appeal, by holding it to extend to cases which do not fall strictly within the words of the Act.' Macpherson, J., was of the same opinion, and said that he thought 'that the summary procedure is confined to the two classes of cases specified in section 53 of the Act.' Fully concurring in the decision in that case, and in the reasons given for it, which seem to me to be applicable to the present case, I must reject the petition and leave the mortgagee to his remedy by ordinary civil suit.

Petition rejected.

(*b*) Sec. 55.

Original Suit No. 22 *of* 1869.

1869.
July 19.

PARSHOTAM MANCHHA'RA'M .....*Plaintiff.*
MIRZA' ABDUL LATIF KHA'N .....*Defendant.*

Limitation—Acknowledgment in writing—Signature of Agent—Act XIV. of 1859, *Sec.* 4.

Under Sec. 4 of the Limitation Act (XIV. of 1859) an acknowledgment in writing, signed by the agent *or constituted attorney* of the debtor, is not sufficient.

THIS suit was brought by the plaintiff to recover from the defendant, as heir and legal representative of Mirzá Alli Muhammad Khán, the sum of Rs. 17,545, with interest thereon at 9 per cent. per annum, from the 8th of January 1869, until payment.

It was alleged by the plaint that Mirzá Alli Muhammad Khán, on the 17th of November 1859, made a promissory note in favour of the plaintiff in the following form:—

"*Bombay, 17th November* 1859.

"Borrowed and received of and from Parshotam Manchhárám the sum of Rs. 8,033, which I promise to pay on or before the 17th of November 1860.

"(Signed) ALLI MUHAMMAD."

Subsequently, Mirzá Alli Muhammad Khán went to reside at Hyderábád, and during his absence managed his business in Bombay through his *constituted attorney*, Muhammad Tuckee. The plaint further alleged that Muhammad Tuckee, in December 1866, adjusted the account of the money due upon the promissory note up to the 17th November 1866, and signed such adjusted account, and thereby acknowledged Rs. 14,693-11-9 to be due to the plaintiff from Mirzá Alli Muhammad Khán.

Mirzá Alli Muhammad Khán died on the 31st August 1868, leaving the defendant his heir and representative. Demand for payment of the amount due was alleged to have been made upon the defendant, who failed to pay any portion thereof.

1869.

PARSH TAM MANCHHA'RA'M v. MIRZA' ABDUL LATIF KHA'N.

The adjusted account on which the plaintiff relied was headed thus:

"Memorandum of interest from the 17th of November in the year 1859, on the account of Mirzá Alli Muhammad Khán Shustri.

(For) acknowledgment for."

Then followed the figures showing compound interest calculated with yearly stops, and at the foot it was signed across a one-anna receipt stamp

"MUHAMMAD TUKEE

for

ALLI MUHAMMAD."

The power of attorney under which Muhammad Tukee was said to have acted was in its material parts as follows:—

"To all to whom these presents shall come: I, Mirza Alli Muhammad Khan, formerly of Bombay, but now residing in Dakhan Hyderabad, send greeting.

"WHEREAS: I have landed property and other dealings and transactions carried on in Bombay, and am unable to attend to the same personally) and therefore I am desirous to appoint a proper person to do all acts and deeds which may be requisite to be done for the management of my affairs during my absence from Bombay. Now know ye, that I, the said Mirza Alli Muhammad Khan, do hereby appoint my nephew, Aga Muhammad Tuckee, my true and lawful attorney for me, and in my name to enter into, and upon, and view, and survey all and singular my messuages, &c., and to ascertain the state and condition thereof, and to give notice to the tenants to make repairs, pay taxes, &c.; to enter into any contract or agreement for granting any lease, and to execute leases, &c.; to sell and convey the lands, and purchase others, &c.; to sign receipts, and grant conveyances; and also for me, and in my name, to borrow moneys as occasion may require, on the mortgage of all or any of my messuages, &c., for the purpose of my dealings and transactions in Bombay, and to sign mortgages, &c.; and also for me and in my name, to pay out of such moneys to my creditors such sum or sums of money as may be due by me to them, and to take from them, on payment of the moneys due to them, receipts, acquittances, releases, or such discharges as may be deemed expedient and necessary; and also to bring and defend suits, &c., and to compromise the same or refer them to arbitration, &c.; and also for me, and in my name, to sue for, recover, and receive all manner of rents, arrears of rent, &c.; and also in my name generally to use and employ all such lawful and equitable means for recovering and receiving all credits, rents, sum and sums of money or things whatsoever, which my said attorney shall consider to be due and owing to me from any person or persons

whomsoever; and on receipt of the said credits, &c., to give releases, &c., for the same, and generally for me, and in my name, to do, execute, and perform all such acts, deeds, matters, and things as may be necessary or expedient in or about the premises; and as fully and effectually to all intents and purposes as if I myself were personally present.

"(Signed) ALLI MUHAMMAD (Seal)."

The defendant in his written statement denied the authority of Muhammad Tuckee to bind the deceased or himself by the alleged adjustment.

The suit came on for hearing before COUCH, C.J., on the 16th of July 1869.

McCulloch (with him *Scoble*) for the plaintiff.

Pigot and *Latham* for the defendant.

On *McCulloch* opening the case, Pigot, for the defendant, took the preliminary objection that the suit was barred by limitation, as, in order that an acknowledgment of a debt may operate to give a new period of limitation to commence from the date of such acknowledgment, the acknowledgment must be in writing, signed by the person liable himself, and not by his agent. He relied on *Budoobhoosun Bose* v. *Enaet Moonshee* (*a*).

McCulloch:—The case cited cannot, I admit, be distinguished from the present; but the Court here is not bound by a ruling in the Calcutta High Court, unless it concurs in it. According to English law, what a man can do himself he can depute an agent to do for him; and what an agent does, binds his principal. There seems no reason why the same principle should not apply to cases under the Limitation Act.

The case was allowed to stand over, to give Counsel for the plaintiff an opportunity of looking for authorities.

19th July—*McCulloch* stated that he was unable to adduce any authority against the Calcutta case that had been cited.

COUCH, C. J.:—In this case there must be a decree for the defendant with costs.

(*a*) 8 Calc. W. Rep. Civ. R. 1.

1869.

PARSHOTAM MANCHHA' RA'M v. MIRZA ABDUL LATIF KHA'N.

The defendant has cited a case decided by the High Court of Calcutta, and I concur in that decision. The arguments for the plaintiff which were used by Mr. McCulloch were all put forward in the case of *Hyde* v. *Johnson* (*b*), and were there overruled. The same reasons apply to Sec. 4 of Act XIV. of 1859, as the Court in that case considered to apply to 9 Geo. IV., ch. 14, s. 1. In England it was thought prudent to make an alteration in the law, and now the signature of an agent is there sufficient (*c*). There has been no such alteration of the law in this country. As the law at present stands, I must hold that the signature of an agent is not sufficient to fulfil the requirements of Sec. 4 of the Limitation Act, and this suit must therefore be dismissed with costs.

Attorney for the plaintiff—*C. Tyabji.*

Attorneys for the defendant—*Keir, Prescott,* and *Winter.*

(*b*) 2 Bing. N. C. 776. (*c*) 19 & 20 Vict., ch. 97, s. 13.

1869.
Aug. 7.

Original Suit No. 169 *of* 1869.

The HONGKONG and SHANGHA'I BANKING CORPORATION .....*Plaintiffs.*

T. BAKER .....*Defendant.*

Carrier by sea—Delivery of goods carried—Landing goods on Bunder—Custom of Port of Bombay—Bill of Lading—Protection afforded by clause exempting from loss by fire.—Customs Act (*VI. of* 1863), *Secs.* 51, 52, 53, *and* 54.

A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee; but such *primâ facie* obligation may be affected by the custom of the Port where the goods are to be delivered.

Neither by the custom of the Port of Bombay, nor by the provisions of the Custom's Act, is the Master of a ship bound to wait 15 days before commencing to land his cargo, but within a reasonable time after the arrival of his ship—48 hours in the case of a sailing vessel, and somewhat less in case of a steamer—he is at liberty to land goods if the consignee has not then sent boats for them; and such landing is not unlawful, or a breach of contract as carrier, on the part of the master.

The landing of goods under the above circumstances, and setting them apart for the consignee, do not constitute a delivery of them to the consignee; but such goods, after being so landed, continue in the possession of the master as carrier.

The defendant received goods on board his steamer under a bill of lading which exempted him from liability for loss occasioned by the act of God, the Queen's enemies, *fire*, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature or kind, and lawfully landed them on the Custom House Bunder at Bombay, where they were accidentally burned before they were delivered to the consignee.

Held, that he was protected by the above exception in the bill of lading.

THIS suit was brought to recover Rs. 40,000 as damages for the non-delivery by the defendant of certain goods that had been shipped in China on board the steam-ship *American*, of which the defendant was Master.

Somjibhái Vishram, towards the end of the month of January 1869, shipped on the steamer *American*, which was then loading as a general ship at Hongkong, and bound for Bombay, a large quantity of goods consisting of 1,507 tubs of sugar-candy, 53 chests of Punjum silk, 223 bags of sugar, and 25 cases of cassia. When the goods were received on board the Master, T. Baker, signed five bills of lading, and

1869.

HONGKONG SHANGHA'I BANKING CORPORATION v. T. BAKER.

delivered them to Somjibhái Vishrám. The bills of lading were in the usual form :

"Shipped in good order and well-conditioned by Somjibhái Vishrám in and upon the good steam-ship or vessel called the *American*, whereof T. Baker is Master for this present voyage, and now riding at anchor in Hongkong, and bound for Bombay, 510 tubs sugar-candy, weighed, &c., and are to be delivered in the like good order and well-conditioned at the aforesaid port of Bombay. The Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted unto order or its assigns. Freight for the said goods payable here in Hongkong as per margin, with primage and average accustomed. In witness whereof, &c.

"(Signed) T. BAKER."

These five bills of lading Somjibhái Vishrám endorsed in blank, and delivered to the plaintiffs, the Hongkong and Shanghái Banking Corporation, a Joint Stock Banking Company carrying on business in China and Bombay, to secure advances made by them upon the goods.

The *American* sailed from Hongkong, and arrived in Bombay Harbour on the 17th of February. She was consigned by the charterers, Messrs. Jardine, Mathieson and Co., to their agents, Messrs. Remington and Co., of Bombay. On the 18th of February Messrs. Remington and Co. caused a notice of the arrival of the *American*, and a request to consignees of cargo to take delivery, to be inserted in the newspapers of that day.

They also, on the evening of the 17th February, applied to the Custom House authorities for permission to land the cargo at once. Permission was then granted at once to land those goods, for the immediate landing of which provision was made in the bills of lading. About three-fourths of the bills of lading contained a clause authorising the immediate landing of the goods comprised in them. Subsequently, on the production of a memorandum, purporting to be signed by the

Mukádams of the respective consignees, a general permission to land the cargo was given on the 20th of February. Nothing, however, turned upon these permissions.

The *American* commenced to put her cargo into boats and land the same on the 18th or 19th; and the goods comprised in the five bills of lading, the subject of the present suit, were landed between the 20th and 23rd of February.

The defendant endeavoured, but failed, to prove that he had obtained permission from the plaintiffs or their agents to land the goods at once.

When landed, the goods were placed upon the Custom House Bunder, where they remained under the care, and in the possession of, Messrs. Remington and Co., until the 1st of March, when the greater portion of them was burned in a fire, which accidentally broke out in the Post Office, a building adjoining the Custom House, and which fire extended to part of the Custom House premises.

The question therefore arose upon whom the loss was to fall.

The Customs Act VI. of 1863, Sec. 51, enacts as follows:—"A period of fifteen working days after the entry of a vessel not exceeding 600 tons, or such other period as the officer in charge of the Custom House shall direct, shall be allowed (without charge for the officer of customs) for the landing of import cargo from such vessel. One additional day shall in like manner be allowed for every fifty tons in excess of six hundred. If the period occupied in the landing of import cargo be in excess of that so allowed, the vessel shall be charged with the expense of the officer of customs at a rate not exceeding five rupees per diem (Sundays and holidays excepted) for such excess period."

Sec. 52.—"If the importer, owner, or consignee of any goods (except such as shall have been declared by the Master or Commander as not to be landed), or the agent of such importer, agent, or consignee shall not land such goods within fifteen working days after the entry of the vessel importing the same, or within such further period as the bill of lading

1869.

HONGKONG SHANGHA'I BANKING CORPORATION v. T. BAKER.

of such vessel shall specify, the Master or Commander of the vessel, or the officers of customs, on the application of such Master or Commander, may then carry such goods to the Custom House; and the officer in charge of the Custom House shall thereupon be bound to take charge of and to grant receipts for such goods; and if notice in writing shall have been given that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, such officer shall be bound to hold such goods until the freight, primage, duties, and other charges to which such goods are liable shall be paid."

Sec. 54.—"If any earlier period than fifteen working days after the entry of any vessel is specified in the bill of lading of such vessel for the discharge of her cargo, or any part thereof, and if the importer, owner, or consignee of such cargo, or the agent of such importer, owner, or consignee shall not land the same within such specified period, the Master or Commander of such vessel, or the officer of customs on the application of such Master or Commander, may then carry such goods to the Custom House; and the officer in charge of the Custom House shall thereupon be bound to take charge of and to grant receipts for such goods; and if notice in writing shall have been given that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, such officer shall be bound to hold such goods until the freight, primage, duties, and other charges to which such goods are liable shall be paid."

The issues settled were—

I. Whether the defendant delivered the goods according to the bill of lading.

II. Whether the goods were lawfully landed by the defendant, and remained in the Custom House at the risk of the plaintiff.

III. Whether the plaintiffs were bound before the fire to take delivery of the goods.

IV. Whether the defendant was liable for the loss occasioned by the fire.

The suit was heard by COUCH, C.J., on the 24th July and subsequent days.

Pigot and *Scoble* for the plaintiffs contended: I.—That by the custom of Bombay, as well as by the provisions of the Customs' Act, the defendant was bound to wait 15 days before landing the goods. II.—That having landed them before the expiration of 15 days, the defendant was a wrong-doer, and liable for any loss that thereby resulted to the goods. III.—That the defendant was in possession of the goods on the bunder as a common carrier, and was not protected by the clause in the bill of lading exempting him from loss caused by fire, as such exemption was limited to loss by fire at sea. They cited *Gatliffe* v. *Bourne* (*a*).

The Hon. J. S. *White* (Advocate General), *Green*, and *Latham* for the defendant contended: I.—That the custom of Bombay authorised the landing of the goods before the expiration of 15 days. II.—That by the custom of Bombay the landing of goods upon the Custom House Bunder was equivalent to a delivery of them to the consignees. III.—That the defendant landed the goods with the consent of the Mukádam of the consignees, and that such consent was sufficient, though the plaintiffs were holders of the bill of lading. IV.—That having landed the goods, the defendant held them as a warehouse-keeper, and in such capacity was not liable for their accidental destruction. V.—That the defendant landed the goods as carrier, and was protected by the clause relating to fire in the bill of lading.

Cur. adv. vult.

7th August—COUCH, C.J.:—This suit was brought by the plaintiffs, as the indorsees of five bills of lading signed by the defendant as the master of the steam-ship *American*, of certain goods shipped on board the *American* at Hongkong by Somjibhái Vishrám, to be delivered at the port of Bombay "unto order or to its assigns," for the non-delivery of a portion of the goods which were destroyed by the fire that broke out in the Post Office on the 1st of March last.

(*a*) 4 Bing N. C. 314.

1869.
HONGKONG SHANGHA'I BANKING CORPORATION v. T. BAKER.

The first issue raised is, whether the defendant delivered the goods according to the bill of lading. It is the duty of the master to deliver to the persons mentioned in the bill of lading or their assigns; and where the goods are deliverable to the shipper's order, as was the case in these bills of lading, and the bill of lading is endorsed in blank, and delivered as a security for advances, the delivery must be made to the holder of the bill of lading: Abbott on Shipping, 10th Ed., p. 247. The argument of the Advocate General, who appeared for the defendant, that a delivery to the Mukádam of Somji Vishrám, who did not and could not produce the bills of lading, cannot be supported. It is quite opposed to the nature of the contract in the bill of lading and the established rules of law relating to it. Nor is it necessary, as was also argued by the Advocate General, that the defendant should have dealt with the goods in such a manner as to amount to a wrongful conversion; for by Sec. 1 of Act IX. of 1856 the plaintiffs, as the indorsees of the bills of lading, have vested in them all rights of suit, as if the contracts in the bills of lading had been made with themselves. The present suit is for a breach of the contract.

But the *primâ facie* obligation of a carrier to make an actual delivery to the consignee personally may be affected by a well-established and generally well-known custom and usage. And in the case of carriers by water Lord Tenterden says: "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places and the usage of particular trades." In the judgment of the Court in *Gatliffe* v. *Bourne* (*a*), delivered by Chief Justice Tindal, it is said: "But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation

(*a*) 4 Bing. N. C. 329

of such a mode of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery."

The first question then which the Court has to determine is whether the landing of the goods at the Custom House Bunder, and setting them apart (assuming that the evidence shows this to have been done), were, according to the custom of the port of Bombay, a delivery to the plaintiffs. It will be convenient to state the evidence of the witnesses on both sides as to the custom. Mr. Brice said: "As far as my knowledge goes, the practice is that ship's captains cannot land goods within 15 days of the ship's arrival, except with the concurrence of the consignee, or under condition in the bill of lading. It is the practice for all steamers to land their goods immediately; they provide for power to do so." Mr. Parker said: "The custom of the port in the case of goods arriving by steamer from China is to allow the consignees 15 days to take delivery." Mr. Macaulay: "Where there is no provision in the bill of lading the custom in Bombay is not to discharge till 15 days after arrival; it applies to both ships and steamers." Mr. Macintosh: "The custom is that after 15 days, if the consignee does not send boats alongside, the captain can land them at the consignee's risk and expense. If the consignees do not send for the goods during the 15 days, they must remain on board;" and he made no distinction between sailing vessels and steamers. Mr. Forman said: "Before 1863 the custom was to allow the consignees of cargo a reasonable time to take delivery from the vessel, steamers as well as sailing vessels. If it was important to get the ship away quickly, the owners or agents used to discharge the cargo on their responsibility in the case of

1869.

HONGKONG SHANGHA'I BANKING CORPORATION v. T. BAKER.

both steamers and sailing vessels. Since 1863 they have had to wait 15 days, or land on their own responsibility. I have had more experience in sailing vessels than steamers; but my statement applies to both, unless there is a clause in the bill of lading." Chabildás Lallubbái, the partner of Mr. Macintosh, in examination in chief said he agreed with Mr. Macintosh; and on cross-examination, "I agree with Mr. Forman as to the custom since 1863." Mr. Paterson said: "The custom in the case of steamers from Europe is that 15 days are supposed to elapse before the cargo is discharged at the risk of the consignee. I am not aware of any difference in the custom between steamers and sailing vessels." Mr. De Quadros: "If the goods are landed before 15 days are out, we (Ritchie, Steuart, and Co.) retain them in charge of our Mukádam at the Custom House. The practice of other houses is the same as ours. There is no difference between a steamer and a sailing vessel. We have often landed goods before the 15 days are out." Mehervánji Mancharji, assistant of Ewart, Latham and Co., said: "15 days are allowed in the case of every ship of 600 tons. I don't know of any difference between steamers and sailing vessels. Goods were landed by us from the *Star of India* within 15 days. We landed on our responsibility. She was a sailing vessel. I have heard of other instances besides the *Star of India* where the landing has been within the 15 days." The foregoing were witnesses called by the plaintiffs. The following were called by the defendant:—Mr. Fogo said: "Our practice has been to land cargoes from vessels if the parties did not send for the goods within a reasonable time after her arrival. There has been no certainty in our practice as to the time allowed. It would not be a reasonable custom for a steamer to wait 15 days, because the expenses of a steamer are greater than those of a sailing vessel. The Mukádam has charge over the goods only so far as seeing to their due delivery to the parties interested. *He lands them as our servant, and holds them till he gets authority from us to deliver them.*" Mr. Kettridge: "Goods are discharged from ships and steamers as they come to hand, after due notice by advertisement, or special notice to

the consignees of the arrival of the ship, and her being ready to discharge. If the captain came to goods for which the consignees had not sent, he would discharge them at once, provided there was not other cargo which he could discharge, and for which boats were waiting. I know of steamers discharging immediately on their arrival, without any clause in the bill of lading enabling them to do so. I am not acquainted with any custom to wait 15 days for the consignees to land. The custom authorizes the master, after reasonable notice to the consignees of goods, to discharge the same as the goods come to hand in the boats hired by the captain in case the consignees' boats are not ready. I should say the custom is to allow 48 hours from the entry of the ship at the Custom House—that is for a ship; not more than 24 hours in the case of a steamer. I think this custom is acted upon in the port of Bombay." Mr. Wilson, the manager of the firm of Rennie, Scovell and Co., said: "The custom in Bombay where the ship has a general cargo is to advertise her arrival in the papers, to wait for boats from consignees (my practice has been to wait a day after the ship was ready to discharge), and when the consignee's boats don't come alongside, to send our own boats, and take the cargo to the Custom House Bunder. I speak of sailing ships. I never had any steamers consigned to me. In steamers the custom is to allow less time. I never knew of a ship waiting 15 days before discharging cargo. I have known frequent instances of ships landing cargo on the Custom House Bunder before the 15 days had expired, without the consent of the consignees being obtained. I know of no instances showing at whose risk the goods were. If the goods are landed before the 15 days, the Custom House will not hold them for freight. We have landed at the Custom House Bunder without anything but the boat note." Mr. Owen said: "As soon as the ship arrives, we advertise in the papers requesting consignees to send boats alongside, and if they don't do so, we shall discharge the goods on their account. We send a circular round to consignees to the same effect. We then tell our Mukádam to send boats alongside, and discharge any goods for which no boats have come from the

1869.

HONGKONG SHANGHA'I BANKING CORPORATION v. F. BAKER.

consignees. We generally commence discharging 48 hours from the ship's entry at the Custom House, and land the goods at the Custom House Bunder. We commence as soon as we can, but we generally allow 48 hours. I have known no instance of a ship waiting 15 days. If the goods are landed before the 15 days, I cannot say at whose risk they are according to the custom of Bombay." Mr. Henry Maxwell said: "My experience is, that 48 hours after the arrival of the ship, if consignees of cargo whose cargo was preventing the discharge of the ship did not come forward to take delivery, that cargo would be landed either by the captain or by the agents of the ship at the Custom House Bunder. At the present moment I cannot recall instances of goods being landed before the expiration of 15 days from the arrival of the ship. I know of no instance of a sailing ship waiting 15 days before discharging. I can say nothing about steamers; I have had no experience." Mr. Moore, of the firm of Campbell, Mitchell and Co., said: "The custom in Bombay is to advertise the arrival of a ship, and send round a circular to all the offices, European and Native, in Bombay, and then to land the cargo as boats come for it. The custom is not to wait more than a day or two for the consignees to send off boats. As a general rule the cargoes are landed at the Custom House Bunder. I can't say that I remember any instance of a ship waiting 15 days for the consignees to come and take the cargo before proceeding to discharge. I have known cases where goods have been landed by the master or agents before the ship has been in the harbour 15 days. I have never known any dispute, except as to the payment of the landing charges. The consignee comes and takes the goods from the Custom House Bunder."

I cannot upon this evidence think that the custom of Bombay obliges the master to keep goods on board for 15 days after the ship's arrival for the consignee to send for them. But few of the witnesses speak to such being the custom, and the balance of the evidence is against it. And seeing how much injury it might cause to the ship-owner, and how little benefit it would confer on the consignee,

stronger evidence than there is in this case would be necessary to satisfy me that such a custom had been so uniformly acted upon that it must be considered to be part of the contract. On the other hand, the evidence does not, in my opinion, show that the landing at the Custom House Bunder is, by the custom, a delivery to the consignee. Indeed, some of it is directly opposed to this, it being said that the goods are landed at the risk of the master or ship-owner, and that they remain in the custody of the Mukádam of the ship's agents until an order is given for their delivery to the consignee. If the landing on the Custom House Bunder is a delivery to the consignee, the possession of the goods would be parted with, for the master cannot both deliver the goods and keep possession of them. And if he once voluntarily parts with the possession out of his own or his agent's hands, he looses his lien upon the goods, and is not authorized by law to reclaim them: Abbott on Shipping, 10th Ed., p. 282. This is to my mind a cogent reason for considering that the landing is not by the custom a delivery under the bill of lading. The custom appears to me to be that, at the expiration of a reasonable time after the arrival of the ship, which in the case of sailing vessels seems to be considered to be 48 hours, and in the case of steamers somewhat less, the master is at liberty to land goods if the consignee has not sent boats for them; that the landing is lawful, and not a breach of duty or of the contract, and the consignee is bound to take delivery from the Custom House Bunder instead of the ship, and to pay the proper charges for landing; but that the goods remain in the possession of the master by his agents, and are not delivered under the bill of lading. And the master continues liable as a carrier upon the bill of lading; for, as is said by Buller, J. in *Hyde* v. *The Trent and Mersey Navigation Company* (*a*), he received the goods in the capacity of a carrier, and as the engagement was to carry and *deliver* them, the goods remain in his custody as a carrier the whole time. And in *Gatliffe* v. *Bourne* (*b*) the Court say they think the ship-owner is

(*a*) 5 Term Rep. 398. (*b*) 4 Bing. N. C. 332.

1869.

HONGKONG SHANGHA'I BANKING CORPORATION v. T. BAKER.

acting during the whole of the time whilst the goods are in his possession under the obligation of a common carrier. The provisions of Act VI. of 1863 are not inconsistent with this being the custom. They only (Secs. 52, 54) provide that in certain cases the officer in charge of the Custom House shall be bound to take charge of, and to grant receipts for, the goods, and if notice in writing is given, shall be bound to hold them until the freight and other charges are paid. The Custom House authorities were not bound to take charge of these goods, and they do not appear to have done so. The defendant in his written statement (para. 4) says that Hari Bhánji, the Mukádam of Messrs. Remington and Co., "was in charge of the cargo so landed from the said ship for the purpose of preserving their lien thereon."

For the above reasons I am of opinion that the defendant did not deliver the goods according to the bill of lading; and that he is liable for the loss occasioned by the fire unless it comes within the exception. If the goods had been exposed to the risk of fire by any disregard by the defendant of his duty or of the contract, I think he would have been liable, notwithstanding the exception. This has been held in America: Angell on Carriers, Sec. 227; but I am not aware of any English decision upon the point. But here, according to the custom, there was no disregard of duty or of the contract; the landing was authorized and lawful, and the goods were not put in an improper place. I do not think that the meaning of "fire" in the exception is to be controlled by the words which follow it, and limited to a fire on board the ship. The fair construction of the bill of lading appears to me to be that the exception is co-extensive with the liability; that it applies as long as the goods remain in the defendant's possession as a carrier under the bill of lading. It is true, as Mr. Scoble argued, that, when landed, the goods are not protected by any insurance that may have been effected upon them for the voyage; but neither would they be if the consignee had himself landed them, or if, instead of being landed in accordance with the custom of the

port, it had been done under a clause in the bill of lading. The consignee must be taken to know the custom of the port; and if he fails to send for his goods within the prescribed time, he must abide by the consequences as regards the insurance. I am of opinion that the finding on the 4th issue should be for the defendant, and there must be judgment for the defendant with costs.

Judgment for defendant with costs.

Attorneys for the plaintiffs—*Hearn*, *Cleveland*, and *Peile*.

Attorneys for the defendant—*Keir*, *Prescot*, and *Winter*.

Original Suit No. 274 *of* 1869. Aug. 20.

BALVANTRAV BHA'SKAR .....*Plaintiff*.
BAYA'BA'I, Widow, and CHINTA'MAN MADDAN *Defendants*.

Hindú law—Adoption—Orphan.

According to the Hindú law prevailing in Western India, an orphan cannot be adopted.

THE plaint in this case stated that one Maddan Jagannáth, a Hindú Bráhman, on the 4th of January 1864, executed his last will; the material portions of which were as follow :—"The three persons, namely, my wife, Laksh'mibái, Bayábái, widow, the daughter of my deceased elder brother, and my nephew, Balvantrav Bháskar, are the owners of whatever moveable and immoveable property, ornaments, &c., belonging to me that may remain after me. These three persons are only to use the above-mentioned immoveable and moveable property; they are not to sell it; and after the death of the above-mentioned two females, my nephew, Balvantrav Bháskar, is the owner in every respect***. Perchance, should he have no issue, and should Chiranjiva Jagannáth Janárdhan, the son of his elder brother, behave well, then Balvantrav Bháskar may give the property to him after due consideration; otherwise, he is to spend the same for religious and charitable purposes. And whatever may have to be done by the above-mentioned three owners shall be done

1869.

BALVANTRAV BHA'SKAR v. BAYA'BA'I and CHINTA'MAN MADDAN.

by them with unanimity." The power to make certain outlays, and the general management of the property was then reserved to Bayábái during her life, and subsequent thereto to Lakshmibái; and the latter two and Balvantrav Bháskar were appointed respectively executrixes and executor of the will.

The testator died on or about the 24th of February 1864, and after his death the will could not be found; but on the application of Balvantrav Bháskar, the draft of it was admitted to probate on the 17th of December 1868.

Lakshmibái had previously died in December 1865.

The plaint further alleged that the testator died possessed of moveable and immoveable property (comprising *inter alia* a dwelling-house at Breach Candy, in Bombay), and that upon his death Bayábái (the defendant) and Lakshmibai took possession of the property, and since that time, or the defendant, Bayábái alone, on her own behalf, or that of the defendant Atmaram Raghoba, afterwards called Chintáram Maddan, received the rents and profits, or occupied the same, and excluded the plaintiff from all possession or enjoyment thereof, and refused to account to him for the rents and profits; that the defendant, Bayábái, sold, or intended to sell, portions of the moveable property of the testator, and committed wilful waste and damage to the dwelling-house.

The plaintiff prayed: 1. for an account of the property of the testator, and of the rents and profits thereof, in the usual form; 2, that the share of the plaintiff in the rents and profits might be ascertained, and ordered to be paid to him; 3, that proper directions might be given for securing the rights of the plaintiff; 4, that the defendants might be restrained from selling, charging, or wasting the property.

The defendant, Chintáman Maddan put in a written statement, in the third para. of which he stated that after the death of the testator, his widow, Lakshmibái, pursuant to a direction and authority in that behalf, received from her husband before his death, duly adopted him, Chintáman Maddan, as the son of the said Maddan Jagannáth, and that

the said Lakshmibái died in the year 1865; that by the said adoption all the property of the said Maddan Jagannáth had become vested in him Chintáman Maddan as the sole heir of the said Maddan Jagannáth, according to Hindú law.

The case came on for hearing before COUCH, C. J., on the 16th of August 1869.

Scoble and *Green* for the plaintiff.

McCulloch and *Starling* for Chintáman Maddan.

The third issue raised was whether the defendant, Chintáman Maddan, was legally adopted, as alleged in the third paragraph of the written statement.

The witnesses called for the defendant, Chintáman Maddan, to prove the fact of his having been adopted by Lakshmibái gave evidence of his having been an orphan upon whom the ceremony of *upanayan* had been performed at the time when the alleged adoption took place.

COUCH, C. J., intimated his opinion that such an adoption could not be valid, and evidence to prove the fact of the adoption, was not allowed to be then given, and the matter stood over till the next sitting of the Court.

20th August—COUCH, C. J.:—When the Court last sat I intimated my opinion that, independently of the age of the alleged adopted son in this case, and the performance of the *upanayan* ceremony upon him, the adoption was invalid. Since then I have consulted the authorities. I find a case in the Madras High Court Reports, where it is laid down that an orphan cannot be adopted. The law in this respect is the same here as in Madras, and I shall follow that ruling. The defendant's own witnesses show that the person here alleged to have been adopted was an orphan, and I shall therefore refuse to hear any evidence in respect of the fact of the adoption. The case to which I allude is that of *Subbaluvammal* v. *Ammakutti Ammal* (*a*). To constitute a valid

(*a*) 2 Mad. H. C. Rep. 129.

1869.

BALVANTRAV BHA'SKAR v. BAYA'BA'I and CHINTA'MAN MADDAN.

adoption there must be a giving as well as a receiving, which there cannot be in the case of an orphan.

A decree was subsequently made against the first defendant, Bayábái, for an account, as prayed for, but not against Chintáman Maddan, as it was not shown that he had intermeddled with the estate.

Attorneys for the plaintiff—*Dallas and Co.*

Attorneys for the defendants—*Macfarlane* and *Green.*

Sept. 13.

In the Insolvent Debtors' Court.

IN THE MATTER OF RAGUBHA'I RA'MCHANDRA.

Insolvent—Adjudication in Insolvency—Effect of Imprisonment under Civ. Proc. Code.

Held, that a judgment debtor who had been in prison for two years under the Code of Civil Procedure was liable to be adjudicated an insolvent in respect of the same judgment debt where the Petition for adjudication was presented before he was released from prison under Sec. 278 of the Code.

On the 19th of July 1869 *Ferguson,* on behalf of Appáji Pándurang, constituted attorney of Gopál Krishṇá Modak, presented a petition to Westropp, J., sitting as Commissioner in Insolvency, praying that Ragubhái Rámchandra might be adjudicated an insolvent, and dealt with according to the provisions of the Act for the relief of Insolvent Debtors in India (11 and 12 Vict., c. 21, sec. 8).

The affidavit of Dhondu Shámráv, upon which the petition was founded, stated that on the 25th of February 1867 Gopál Krishṇá Modak obtained a decree against Ragubhái Rámchandra in the High Court for the sum of Rs. 12,931-5-4, and, further, interest on that amount at six per cent. per annum and costs. That in execution of that decree, a warrant of arrest was issued on the 26th of March 1867, and that in pursuance of the warrant, Ragubhái Rámchandra was committed to prison by a Judge's order dated the 15th of July 1867.

At the expiration of his second year of imprisonment, on the 15th of July 1869, Ragubhái Rámchandra was released

1869.

In re RAGUBHA'I RA'MCHANDRA

from prison under the provisions of Sec. 278 of the Civil Procedure Code. Although the present petition was not formally presented to the Commissioner until the 19th of July, it had been mentioned before the release from imprisonment of Ragubhái Rámchandra, and it was then directed that the application should stand over until the 19th, the applicant not to be prejudiced by the delay.

Ferguson contended that although Ragubhái Rámchandra had lain for two years in prison, he had not thereby satisfied the decree; that, though he could be no longer imprisoned on account of the decree, his property continued liable, and he was himself liable in respect of the unsatisfied decree to be adjudicated an insolvent, under Sec. 8 of the Insolvent Act.

A rule *nisi* was granted. The rule came on for argument before COUCH, C. J., on the 13th of September 1869.

Ferguson for the petitioner.

Ragubhái Rámchandra appeared in person, and stated that he had no property, that the petitioner was his sole creditor; and that he had been in prisoir for two years. He contended that, under these circumtances, he was not liable to be adjudicated an insolvent.

COUCH, C. J.:—I think that the imprisonment in this case under the Code of Civil Procedure is not a satisfaction of the decree, and that the judgment debtor can, therefore, be now made an insolvent under the Act. I do not say that the insolvent could be further imprisoned under Sec. 50 or Sec. 51 of the Act; that, if necessary, must be considered hereafter. The usual order must be made for the filing by the insolvent of his schedule within the time generally allowed for that purpose.

Order accordingly.

Attorneys for the petitioner—*Dallas and Co.*

1869.
Oct. 7.

Referred Case.

BLACKWELL and Co. .....*Plaintiffs.*
SUMA'R A'HMED .....*Defendant.*

Small Cause Court—Jurisdiction—Splitting cause of action—Act IX. of 1850, *Sec.* 34.

The defendant, as broker for the plaintiffs, guaranteed all transactions entered into by the plaintiffs with native firms through the defendant.

Some of these native firms, in respect of such transactions, became indebted to the plaintiffs, and the defendant wrote to the plaintiffs requesting them to sue such defaulting firms.

The plaintiffs accordingly sued six of such firms, and sent a letter to the defendant claiming from him payment of the taxed costs incurred in all the suits, amounting to Rs. 7,553-10-6.

The defendant having failed to pay, the plaintiff sued him in the Small Cause Court to recover payment of the taxed costs incurred in one of the suits, amounting to Rs. 433.

Held, that the plaintiffs in doing so were splitting their cause of action within the meaning of Sec. 34 of the Small Cause Court Act (IX. of 1850).

CASE stated for the opinion of the High Court, under Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes:—

"In this case the plaintiffs claimed from the defendant and his two partners, whose names were subsequently struck out of the summons, the sum of Rs. 572-0-9.

"The principal claim of the plaintiffs was a sum of Rs. 433, with interest on the said sum of Rs. 433, being the amount of a bill of costs paid by the plaintiffs to their Solicitors, which bill was taxed on the 8th February 1867, and was paid to Messrs. Hore and Langley some time before the 14th day of May 1868.

"The plaintiffs sought to recover the amount from the defendants under the following circumstances:—

"The defendants, in the year 1865, acted as the plaintiffs' brokers, guaranteeing the plaintiffs against any losses that might arise in the transactions entered into with native firms by the plaintiffs through the defendants as brokers.

"Several transactions so entered into resulted in loss to the plaintiffs; and on the 20th February 1865 the defendants wrote to the plaintiffs a letter as follows:—

'DEAR SIRS,—In reply to your letter of the 17th February requiring explanations of a subject contained in ours of the 16th instant, we beg to state that as soon as any party refuses acceptance or payment of redraft on him, we advise you to take legal measures against such party as soon as possible; and notwithstanding our such advice to you, if you delay to do so, and in the course of such delay if the party is bankrupt or runs away, the risk is not to be suffered by us, but by yourselves. In case if you order your lawyers to proceed against such party, and if they delay to proceed, of course the risk as above-mentioned in the course of the delay is not to be suffered by us. But for all delays in laws (neither occasioned by yourselves nor by the lawyers) our guarantee is to continue in full force as per agreement.'

"The defendants also, when requested by the plaintiffs to give a list of the names of the persons against whom the defendants desired that the plaintiffs should proceed at law, wrote to the plaintiffs a letter, dated 2nd October 1865, containing the names of six firms that they were to proceed against.

"In pursuance of the defendant's request the plaintiffs took certain legal proceedings against the firm of Vussonjee Narron and Co.

"About May 26th, 1866, the defendants compromised the claim in the case then pending in the names of the plaintiffs *v.* Vussonjee Narron.

"On the 20th April 1868 the plaintiffs wrote a letter to the defendants, claiming from the defendants the sum of Rupees 7,553-10-6, which sum, it was admitted before me, included the sum of Rs. 433 now sued for, together with the amount of several other bills of costs incurred by plaintiffs under similar circumstances to those in the present case.

"On the above state of facts the only defences raised by Mr. Macfarlane for the defendants were:

"1. The Statute of Limitation.

"2. That the plaintiffs having, in the letter of 20th April 1868, consolidated their present claim with others, and demanded the entire sum therein alleged to be due to them,

1869.
BLACKWELL & Co.
v.
SUMA'E A'HMED.

in suing for this amount separately were splitting their cause of action.

"I held that there was nothing in the facts as admitted to show either an abandonment or a splitting of the cause of action.

"I disallowed the item of Rs. 20 claimed by the plaintiffs.

"I was of opinion that the plaintiffs were entitled to recover the sum of Rs. 433, together with interest at 9 per cent. from the 14th May 1868, the plaintiffs not being able to prove that they had paid the amount of the taxed bill of costs to their solicitors before that date.

"I found a verdict for the plaintiffs for the sum of Rs. 433 and Rs. 29-4-4, interest and costs, subject to the opinion of the High Court, on the question above stated, namely, does the 2nd plea afford a good defence to the action."

The case was argued before COUCH, C.J., and SARGENT, J.

Scoble and *Ferguson* for the plaintiffs:—Sec. 34 of the Small Cause Court Act for the Presidency Towns (IX. of 1850) says that "A plaintiff shall not be allowed to divide any cause of action for the sake of bringing two or more suits in any of the said Courts;" the words used in the English County Court, Act 9 and 10 Vict., c. 95, s. 63, are almost identical, so the decisions under the latter Act are applicable here. The words of Sec. 63 are: "That it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts." This Section was considered in the case of *Grimbly* v. *Aykroyd* (*a*), where Pollock, C.B., delivered the judgment of the Court. He expressly refrained from deciding whether all debts that could be comprised in one description in one count must be considered one cause of action within the meaning of the section, and confined his judgment to the case of tradesmen's bills, in which one item *is connected* with another in this sense that the dealing is not intended to terminate with one contract, but to be continuous. That is not the case here; the items in the solicitor's bills in each suit brought are connected in this sense, but not the

(*a*) 1 Exch. 479

solicitor's bills in separate suits, which bills, when paid, give rise to distinct causes of action. The same question was considered in *Wickham* v. *Lee* (*b*), where it was held that rent in arrear, and a demand of double value for holding over after notice to quit, were separate causes of action; and Erle, J., laid down the general rule that a plaintiff was not splitting his cause of action if he brought separate plaints for causes of action which in a Superior Court would render two distinct counts indispensable. If this claim were brought under the Common Law Procedure Act, it would be the more correct course to have a separate count for each separate bill of costs. The fact that the plaintiffs have made a joint claim for all these bills does not convert into one several causes of action: *Brunskill* v. *Powell* (*c*), *Kimpton* v. *Willey* (*d*). The items here are not more connected than in *Neale* v. *Ellis* (*e*), or in the *King* v. *The Sheriff of Herefordshire* (*f*). The objection taken in the Small Cause Court was premature, as the plaintiffs might never have sued for the remaining items.

Marriott for the defendant:—The plaintiffs having, in their letter of the 20th April, treated the liability of the defendant in respect of the bills the plaintiffs had paid as a single cause of action, should not now be allowed to divide; but even if they had not done so, the test laid down in *Wickam* v. *Lee* applies, as the claim might all be inserted in the same count.

COUCH, C. J. (after stating the facts), proceeded:—The letter of the 20th of February 1865, which authorised the plaintiffs to commence actions against the native firms is a very informal document; but, acting upon it, the plaintiffs have taken proceedings against several native firms, and incurred costs. Of the costs incurred under it, and of their amount, it was necessary that the defendant should have notice; for until then there was no complete cause of action. From the facts appearing in the case, as stated, we gather

(*b*) 18 L. J. Q. B. 21. (*c*) 19 L. J. Exch. 362. (*d*) Ibid C. P. 269.
(*e*) 1 Dowl. & L. 163. (*f*) I. B. & Ad. 672.

1869.
BLACKWELL & Co. v. SUMA'E AHMED.

that the demand for payment of those costs, with an account annexed, was first made on the 20th of April 1868; no payment was then made by the defendant, and the present cause of action thereupon arose.

It is clear that all the items in the account might then have been included in one count of a declaration under the Common Law Procedure Act of 1852, and so they fall within the rule laid down by Erle, J., in *Wickham* v. *Lee* (*ubi supra*). By selecting only one item of that account, the plaintiffs have, in my opinion, split their cause of action within the meaning of Sec. 34 of the Small Cause Court Act. The objection now taken by the defendant is not premature, because there was no abandonment of the excess as required by the Act. All the cases cited for the plaintiffs are distinguishable from the present one. The Judge of the Small Cause Court was, therefore, wrong in giving judgment for the plaintiffs, and his judgment must be reversed. The plaintiffs must pay the costs of reserving this case and consequent thereon; but as the Court below acted without jurisdiction, there can be no order as to the costs there incurred.

SARGENT, J.:—I concur in the remarks that have fallen from the Chief Justice, and am quite of the same opinion. The claim arose out of a series of breaches of one continuous contract, and I consider that the case falls within the decision in *Grimbly* v. *Aykroyd*, as also within the test laid down in *Wickham* v. *Lee*. I think that at this moment there is but one cause of action; and, on these grounds, I have come to the conclusion that the Judge of the Small Cause Court was wrong in his decision.

Attorneys for the plaintiffs—*Rimington, Hore, & Langley.*

Attorneys for the defendant—*Macfarlane* and *Green.*

Appeal No. 153.

1869.
Oct. 8.

KA'ZI GULA'M ALLÌ bin KA'SI ISMA'IL .....*Appellant.*
H. H. AGA' KHA'N .....*Respondent.*

Evidence—Contradiction of witness on collateral question.

The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute; the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence.

THE plaintiff in this suit, who was a Suni Mussalman, claimed to be entitled, as hereditary trustee or *motiwallah*, to the possession and superintendence of a piece of ground which he alleged had been appropriated by his great-grandfather about 125 years before suit brought as a burial-ground for himself and the members of his family, and for such Suni Mussalmans as he might give permission to use the same. The piece of ground claimed was situated to the north of a burial-ground of the Khojá Muhammadans, from which at the time of suit it was not divided, and through which the plaintiff claimed a right of way for himself and all Suni Mussalmans whom he permitted to use the ground in question. The plaintiff alleged that this piece of ground had been, up to the year 1863, separated from the Khojá burial-ground by a low stone boundary wall, and that in the same year the ground had been covered with about 50 tombs of chunam and about 200 tombs of loose stones, all being the tombs of members of his own family and of other Suni Mussalmans; that in the year 1863 the defendant had removed the low stone boundary wall and the Suni tombs, and had excluded the plaintiff from the ground in question, and had possessed himself of it. The plaintiff prayed, as *motiwallah*, to be declared entitled: 1, to the possession and superintendence of the ground in dispute; 2, to the right of way claimed by him; and, 3, to damages.

The defendant denied that the piece of ground claimed had ever belonged to the plaintiff or his ancestors, and on the

1869.

KA'ZI GULA'M ALLI bin KA'SI ISMA'IL v. H. H. AGA' KHA'N.

other hand alleged that it formed portion of the Khojá burial-ground. He denied that there ever had been any such tombs upon it as the plaintiff alleged, and also denied the existence of the low stone boundary wall.

The case was tried by ARNOULD, J., in the First Division Court in July and August 1868.

White, *Dunbar*, and *McCulloch* for the plaintiff.

The Honourable L. H. Bayley (Advocate General), *Pigot*, and *Cooper* for the defendant.

The oral evidence given for the plaintiff and defendant respectively was very contradictory. No title-deeds were produced on either side, and Allárakhiá Sumár, the Mukki of the Jamát property, having charge of the Khojá burial-ground, who was called as a witness for the defendant, stated that there were no title-deeds of the Khojá burial-ground, except of a small piece recently purchased in 1856. In cross-examination by Mr. Dunbar, this witness said: "We have not any title-deeds of the *kabarasthán*, nor have we ever had. I have never seen any since I became Mukki. The property stands in the name of Ibráhim Kássam and Karimálli Jivráj. Some few years ago I attended in person, for the purpose of getting this burial-ground registered under the Municipal Act; I believe in 1865. I applied to have it registered in the names of myself and Káká Paddamsi. It was registered in our names afterwards. We got notice from the Municipal Commissioner to attend his office about the registry. We found the Suni Khojás, Ahmed Habbib and Rahim Hansráj, there.*** Previously it stood in no one's name, as far as I know. On applying to the Municipal Commissioner we took no title-deeds of the ground. I produced no title-deeds relating to this *kabarasthán*, because we had not got any.

Dunbar applied to be allowed to call Ahmed Habbib and one Fazul Nur, to show that, before the Municipal Commissioner, Allárakhiá Sumár produced title-deeds of this burial-ground.

The application was refused by ARNOULD, J., on the ground that it was an application to be allowed to contradict

Allárakhiá Sumár on a matter not involved in any of the issues.

Dunbar also applied to be allowed to call certain Ghatis who it was alleged were present at the destruction of the tombs of the defendants, and had thrown the bones taken from them into a large quarry-hole on the ground which had been subsequently filled up.

This application was also refused.

The Court took time to consider its judgment, which eventually, on the 10th November 1868, was given in favour of the defendant.

From this judgment the plaintiff appealed generally upon the evidence, and specially upon the ground of the refusal of ARNOULD J., to receive the evidence of Ahmed Habbib and Fazul Nur, in contradiction of Allárakhiá Sumár, and of his refusal to allow the Ghatis to be called.

The appeal was argued before COUCH, C.J., and MELVILL, J., on the 2nd, 3rd, 4th, 10th, and 11th September 1869.

McCulloch (with him *White*, Advocate General) for the appellant.

Ferguson and *Latham* for the respondent.

Cur. adv. vult.

8th October 1869—COUCH, C. J. (After stating that the substantial questions raised by the issues were, whether the plaintiff was entitled as trustee and *motiwallah* to the burial-ground described in the plaint, and whether the defendant had done any wrongful acts for which the plaintiff was entitled to sue, and after commenting upon the oral and documentary evidence which in the opinion of the Court established the case of the defendant, continued):—It only remains to notice the objection that the learned Judge refused to receive evidence which was tendered. In the course of the cross-examination of Allárakhiá Sumár, who had been Mukki of the Khojá Jamát for about 14 years, and had had the management as part of the Jamát property of the Khojá burial-ground, he said, "We have not any title-deeds of the *kabarasthán*, nor have we ever had. I have

1869.
KA'ZI GULA'M ALLI bin KA'SI ISMA'IL
v.
H. H. AGA' KHA'N.

never seen any since I became Mukki"; and that on his applying to the Municipal Commissioner after the judgment in the suit between the Advocate General and the present defendant to have the burial-ground registered in the names of himself and Káki Padamsi, he produced no title-deeds relating to this *kabarasthán*, because they had not got any; and at the end of his cross-examination, "I am quite sure no title-deeds relating to the *kabarasthán* were produced." Mr. Dunbar, the plaintiff's counsel, applied to be allowed to call Ahmedbhái Habibhái and Fazal Nur Muhammad to show that before the Municipal Commissioner Allárakhiá Sumár produced the title-deed of this burial-ground, which was refused by the Court as being "an application to contradict Allárakhiá Sumár on a matter not involved in any of the issues named." It is frequently a nice question whether a particular matter is one upon which a witness may be contradicted by other witnesses. The reason of the rule which restricts the right to do so is, that it is an object of great importance to confine the attention of the jury as much as possible to the specific issues. Without some rule, many collateral questions of fact might be raised in the course of a long trial; and the specific questions to be determined be lost sight of. At the same time it is desirable that any evidence should be admitted which may assist in determining the respective value of conflicting testimony. And where the trial is by a Judge and not by a jury, there is probably less reason for the rule. We think the rule is well stated in Greenleaf on Evidence, Sec. 52, as excluding all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. According to Pollock, C. B., the test is whether the matter is one which the party proposing to contradict would have been allowed himself to prove in evidence. *Attorney General* v. *Hitchcock* (*a*). Now to apply that test in the present case. If the defendants had any title-deeds relating to this burial-ground, they might be expected to contain some description of it, and if they did, the title-deeds supported by the acts

(*a*) 1 Exch. 91, 99.

of ownership sought to be proved would have been material evidence. A claim resting upon mere acts of ownership is very different from one resting upon title-deeds supported by acts of ownership. And in determining upon the value of evidence of acts of ownership, and the inference to be drawn from them, it is important to know whether the title-deeds have been lost, or there are none, or whether they are purposely kept back. We think, therefore, that the learned Judge ought not to have refused to receive the evidence. But then we have to consider whether if the evidence is received, it ought to vary the decision. If it ought not, its rejection is not a ground for reversing the decree; and it would be useless for us to exercise our power, and take it. Now, the plaintiff not having in the course of his case called for the production of the title-deeds, or suggested that, if produced, they would afford evidence in his favour, cannot now be allowed to make that suggestion. We must simply consider that the title-deeds, if there are any, would not assist the defendant; and in the view which we take of this case, we are of opinion that the existence of title-deeds, if the witnesses should prove it to our satisfaction (and they would be open to the observation that they have a strong bias against the defendant), would not affect the grounds upon which we have come to a conclusion in the defendant's favour. Then as to the evidence of the Ghátis, we think that little, if any, reliance could be placed upon it. As new matter, discovered after the plaintiff's case was closed, it ought not to be admitted, unless it is such as might probably have occasioned a different determination. In our opinion this cannot be said of it.

Decree confirmed with costs.

Attorney for the plaintiff—*Khanderáv Moroji.*

Attorneys for the defendant—*Dallas and Co.*

Suit No. 638 *of* 1867.

1869. Sept. 21.

MUHAMMAD YUSUF.....*Plaintiff.*

PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY .....*Defendants.*

Moving vessel in harbour—Pilot—Negligence of pilot—Onus probandi *—Bombay Harbour Rules—Lights on vessels—Vessel's duty to show lights—Maritime Law—Act XXII. of* 1855, *Secs.* 7 *and* 12.

The taking of a steam vessel on a trial trip from Mazagon to the sea and back again is a moving of such vessel within the meaning of Sec. 12 of Act XXII. of 1855. For such a trip, therefore, the employment of a pilot is compulsory.

Where the employment of the pilot is compulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability.

If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them.

Rules of Bombay Harbour with regard to the showing of lights by vessels in the harbour considered.

Independently of special regulation or legislation, there is no general obligation by maritime law on sailing vessels either under way or at anchor to *carry* a light throughout the night, although, for the sake of avoiding a misfortune, it may, under particular circumstances, become their duty to *carry* or *show* a light.

Although that is so, yet the Court will go some way to treat the dark boat as the wrong-doer; and if a vessel be either under way or at anchor at night in a channel, fairway, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or to show a light, in order to indicate her position, when other vessels are approaching her, and in sufficient time to enable them to avoid her.

THE pleadings and facts of this case sufficiently appear from the judgment of the Court. The hearing before WESTROPP, J., in a Division Court, concluded in June 1869.

The *Honorable J. T. White* (Advocate General) and *Marriott* for the plaintiff.

Mayhew, *McCulloch*, and *Branson* for the defendants.

Cur. adv. vult.

21st September 1869—WESTROPP, J.:—The plaintiff has brought this action to recover Rupees 25,000 as damages from the defendants for having, by their steam-ship *Emeu*, run down his vessel, called the *Khudabakash*, which in his plaint he describes as a bagalo of 800 candies burthen, and as having become a total wreck, and wholly lost by the negligent and unskilful navigation of the *Emeu* by the servants of the defendants.

The plaint also alleges that the collision "occurred on the evening of the 24th of November 1866, in the harbour of Bombay, near the fishing stakes off Mazagon, where the bagalo was lying at anchor for several days before and at the time of the collision"; and "the *Emeu*, being then navigated by the servants of the defendants, steamed up the harbour on the said evening after sunset, and struck the said bagalo so as to cut down the same to the water's edge; and the said bagalo immediately afterwards turned over and sank; and at the time of the said collision the said bagalo had a proper light hung high over the deck, and in such a position as to be seen from a considerable distance from vessels approaching from all sides, and such and so placed as is usual in vessels of the class and size of the said bagalo in the harbour of Bombay, under the regulations in force in the said harbour; and the said bagalo was, at the time aforesaid, anchored in a proper place in the said harbour." The crew were fortunately all saved.

That plaint was not filed until the 11th May 1867, a delay which the plaintiff accounts for by stating that his counsel mislaid his papers. At the mutual desire of the parties the hearing of the cause was frequently afterwards postponed.

The Company, in their written statement in defence, say:—

1. That, at the time of the collision, the *Emeu* was in the charge of a qualified pilot of the port of Bombay, and not in that of any officer or servant of the Company.

2. That the *Khudabakash* did not then carry a proper light, as required by the notice issued in that behalf by the Conservator of the Port.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

3. That there was not then a proper look-out kept on board the *Khudabakash*.

4. That she was then anchored in a dangerous and improper position, viz., in the fairway, by the wilful neglect of the plaintiff's servants, and contrary to the regulation in that behalf of the Commissioner of Customs issued under Act VI. of 1863. (No such regulation was given in evidence.)

5. That the collision and consequent damage were caused not by any want of care, diligence, or skill on the part of the Company's servants, but by the negligence of the plaintiff's servants, the master and crew of the *Khudabakash*.

6. That a Court of Inquiry, appointed by Government, consisting of the acting Senior Magistrate and acting Master Attendant and Conservator of the Port of Bombay, in December 1866, after an investigation of the circumstances of the collision, and hearing all the evidence adduced, decided that the collision was entirely owing to the fault and negligence of the plaintiff and his servants.

As to that sixth averment by way of defence, I must repeat what has already been said at the trial, that howsoever great respect this Court may entertain for the opinion of the Court of Inquiry, held under Acts I. of 1859 and XV. of 1863, its decision, so far from in any way binding this Court, is not even admissible in evidence in such an action as the present. This Court must, quite independently of that decision, arrive at its judgment upon the evidence adduced on the trial of this cause.

The issues originally settled were:—

1. Whether the defendants negligently and unskilfully navigated their steam-ship *Emeu* in manner and form as charged in the plaint.

2. Whether the fact (as to the absence of a proper light in the *Khudabakash*) alleged in the second paragraph of the written statement is true.

3. Whether the fact (as to a proper look-out not being kept on board the *Khudabakash*) alleged in the 3rd paragraph of the written statement is true.

4. Whether the 2nd and 3rd issues or either of them is or are material.

To those four issues the following were subsequently added, viz.:—

5. Whether the bagalo or vessel, in the plaint alleged to be the bagalo or vessel of the plaintiff, was the property of the plaintiff at the time of the collision in the plaint mentioned.

6. Whether the said bagalo or vessel, at the time of the said collision, had such a light, and in such a position, as in the plaint in that behalf alleged; and

7. Whether the said bagalo or vessel, at or previously to the time of the said collision, carried, or the plaintiff, or his servants, in or on board the said bagalo or vessel, showed a light in sufficient time to have enabled the said ship *Emeu*, if properly and skilfully navigated by the defendants or their servants, to have avoided the said collision.

Section 12 of Act XXII. of 1855 enacts that—"In every port subject to this Act *to which the provisions of this section shall be specially extended by any order of the Local Government*, it shall be unlawful to move any vessel of the burthen of 200 tons or upwards, without having a Pilot, Harbour Master, or Assistant of the Master Attendant or Harbour Master on board," &c., "unless authority in writing so to do has been obtained from the Conservator or some Officer empowered by such Conservator to give such authority; and if any vessel shall, except in a case of urgent necessity, be removed contrary to the provisions of this section, the master of such vessel shall be liable to a penalty not exceeding Rs. 200 for every such offence, unless the master of the vessel shall upon application to the proper officer be unable to procure a Pilot, Harbour Master, or Assistant, &c., to go on board the said vessel."

The Government of Bombay, on the 30th December 1857, issued a notification declaring Bombay to be a port subject to Act XXII. of 1855. That notification was confirmed by the Governor General in Council, which confirmation was

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

published in Bombay on the 29th August 1859, together with a notification by the Government of Bombay specially extending Sections 12, 28, 37, and 40 of Act XXII. of 1855 to the port of Bombay, and also containing certain Port Rules made by that Government, with the sanction of the Governor General in Council, under Act XXII. of 1855, of which the first Rule was:—

"No vessel, if above 200 tons, entering Bombay Harbour, shall run up amongst the shipping until she shall have received permission from the Master Attendant or other duly authorised person, but must anchor within and to the eastward of the inner Floating Light; and no such vessel anchored within the limits of the Port of Bombay shall move from one place to another within the port between sunset and sunrise without the special permission of the Master Attendant."

The accident occurred near the conclusion of a trial trip made by the *Emeu* on the 24th November 1866. She had left the usual anchorage of the P. & O. Steam Company's ships at Mazagon about noon of that day, and proceeded to sea. The Company's Superintendent (Captain Henry), and a party of guests were on board, amongst whom was the then Master Attendant. On her return in the evening, some of the guests having been landed as she lay off the Apollo Bunder, the *Emeu* proceeded thence up the harbour towards her moorings at Mazagon. During the whole of the trip she was in charge of Mr. James Jameson, then Acting Senior Pilot of this harbour. He had been obtained for the purpose by requisition, on behalf of the defendants, made at the Master Attendant's Office on the previous day. These circumstances constitute, in my opinion, a substantial compliance with the rule which has been just quoted.

I also think that such a trip (being the whole length of the fairway from Mazagon to sea and back again) was, to all intents and purposes, within the scope of Section 12 of Act XXII. of 1855, and, therefore, that it was compulsory on the defendants to take a pilot for the purpose. This is of importance, because, as Dr. Lushington says, "the owners have been held liable in all cases whatever, when a pilot was on

board, except where the taking such pilot was compulsory; or where the liability was taken away by legislation, as in the case of *Lucey* v. *Ingram*" (*a*). Such was the ruling in *The Attorney General* v. *Case* (*b*), *The Eden* (*c*), *The Earl of Auckland* (*d*), and *The Lion* (*e*).

The extent to which such compulsion to take a pilot, or such exempting enactments protect the owners from responsibility, has been the subject of frequent discussion.

The repealed Statute on this subject, 6 Geo. IV., c. 125, s. 55, (which applied to England only,) enacted that no owner or master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, or incapacity of any licensed pilot duly acting in charge of the vessel under the provisions of the Statute.

In giving the judgment of the Privy Council in the case of *The Christiana* (*f*), which arose on that Statute, Baron Parke said:—"It was held, at first, in putting a construction upon this Statute, that if a pilot was on board, and there was a neglect in the navigation of the vessel, it was *primâ facie* attributable to him, and that he and not the owner was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennett* v. *Moita* (*g*). Subsequently a different and, we think, a more correct view of this subject was taken by Dr. Lushington, the Judge of the Admiralty Court, in the case of *The Protector* (*h*), when, on a full consideration of the question, it was held that the master and owners were *primâ facie* liable, and that the *onus probandi* was thrown on them to show that the neglect was that of the pilot. In order then to free the owners in this case from responsibility, it was their duty to show that the neglect to send down the top-gallant yards, masts, &c., was the neglect of the pilot. Further, it was held in the case of *The Diana* (*i*), affirmed on appeal by this Court (*j*), that the owners were responsible

(*a*) 6 M. and W. 302; S. C. 4 Notes of Cases 463. (*b*) 3 Price 302.
(*c*) 4 Notes of Cases 460. (*d*) 1 Lush. 164. (*e*) Law Rep. 2 Adm. 102.
(*f*) 7 Moo. P. C. C. 172. (*g*) 7 Taunt. 258 (*h*) 1. W. Rob. 45.
(*i*) Ibid 181. (*j*) 4 Moo. P.C.C. 11.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

unless the neglect which caused the damage was solely that of the pilot. If it was the fault of both the pilot and the master or crew, the owners are still responsible. The question then is, whether the omission which is decided to have been the cause of collision in this case, has been shown by the appellants to be that of the pilot only. The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only"—and the same learned Judge adds: "There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If from sudden illness or intoxication he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity."

The present Statute law in the United Kingdom on this subject is the 388th Section of the Merchant Shipping Act of 1854, which enacts that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

One of the first cases on that enactment was that of *The Schwalbe* (*k*). The Court of Admiralty and the Privy Council there adhered to the principle applied in *The Christiana* to the former Act (6 Geo. IV., c. 125), and held that, under the new enactment, the burden of proving that the loss or damage was occasioned by the fault of the pilot still lay upon

(*k*) 1 Lush. 239; S. C. 14 Moo. P. C. C. 241,9.

the owners. So also in *The Iona* (*l*), the Court of Admiralty, and afterwards, on appeal in 1867, the Privy Council, held that it is not enough to prove that there was fault or negligence on the pilot's part, and that if there has been also neglect on the part of the master and crew which has been conducive to the collision, *ex. gr.*, if they have not kept a good look-out, the owners are liable for the damage. The same principle was adopted in *The Minna* (*m*). In *The Velasquez* (*n*) Sir James Colvile, in delivering judgment in 1867 on behalf of the Privy Council, referring to several of the cases already mentioned by me, and to some others of importance, gives an able summary of the present state of the law on the subject, which I now quote: "It has been established by a long course of decisions, both in the High Court of Admiralty and at this Board, that to entitle the owners of a ship, which is under the charge of a licensed pilot, to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused solely by his fault. To show to what extent this general burden lies upon the owners it is sufficient to cite the case of *The Schwalbe*." Sir J. Colvile, after quoting part of the remarks of Lord Chelmsford in delivering the judgment of the Privy Council in *The Schwalbe*, continued thus: "Again, the cases have clearly established that if for any act or omission which contributed to the accident the master or crew is to blame,—then, although the pilot is also to blame, the owners are not exempted from liability. One of the strongest cases of that kind is that of *The Christiana*, for there every act of omission, (and there were several of them) which contributed to the accident, was an act for which the pilot was to blame; yet, inasmuch as for one of them, viz., the omission to strike and haul down certain yards and masts, the master was held to be also in fault, the owners were not exonerated from liability. On the other hand, such cases as *The George* (*o*), and *The Atlas*

(*l*) Law Rep. 1 P. C. C. 426.
(*m*) L. R. 2. Adm. 97.
(*n*) L. R. 1 P. C. C. 491.
(*o*) 4 Notes of Cases 161.

1869.
MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

(*p*), seem to show that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular, which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. If however the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot. *The Iona*, one of the most recent cases decided by this Committee, seems to go the full length of this proposition."

Before proceeding to the application, in the present case, of these rules of law relating to pilots, it will be convenient here to consider whether there was any legal obligation on the plaintiff or his servants, the crew of the *Khudabakash*, to carry or show a light in that vessel, circumstanced as she was upon the night of the collision.

On behalf of the defendants it has been contended that it was incumbent on the *Khudabakash* to carry a light, and that the collision was solely occasioned by the absence of such a light. In support of that contention the defendants put in evidence the following notice :—

"All coasting craft and native boats of every denomination when at anchor, or sailing up or down the fairway, shall, between the hours of sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon at a distance of at least one mile.

"(Signed) W. C. BARKER, Captain, I.N.,
Master Attendant and Conservator of the Port.
"Bombay, 5th January 1859."

(*p*) 5 Ibid 50.

As to that notice, Mr. Cork, the Assistant Master Attendant, in his evidence on behalf of the defendants, said: "It is a part of my duty to see that the regulations as to lights are followed. This is the copy of a notice dated 5th January 1859, issued from the Master Attendant's Office as to lights. I have posted printed copies of that notice in Guzerati, Marathi, and English on Boree Bunder, Carnac Bunder, Chinch Bunder, Bhao Russel's Bunder, and all of the different Bunders from Grant Buildings to the Peninsular and Oriental Company's Docks. There has been no substantial change whatever made in that notice for the last ten years. Generally, according to the practice of our office, those notices are posted up twice a year. This (exhibit No. 2) is a printed copy for the year 1867. The notice for 1866 was printed in precisely the same manner, and was the same as this notice (No. 2) for 1867." On cross-examination he added: "I gave thirty or forty copies of the light notice to the syrang of the office in 1866 to be posted up. I did not see him posting them, but I saw several of them up after he had posted them."

Exhibit No. 2, so far as it is in English, is as follows, the two other portions of it being translations, in Guzerati and Marathi, of the English part.

"All Harbour Craft, Coasting or Sea-going Craft, European or Native, of whatever rig or denomination, when at anchor, or sailing up or down the fairway, shall, between the hours of sunset and sunrise, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a White Light in a Globular Lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light all round the horizon, at a distance of at least one mile.

"(Signed) J. EVERARD C. PRYCE,
Acting Master Attendant and Conservator of the Port.
"Office of the Master Attendant and Conservator of
the Port, Bombay, 1st January 1867." * * *

There is not any evidence in this cause as to whether before Act XXII. of 1855 came into force, or in fact whether

1869.
MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

before the 5th of January 1859 (the date of the first notice) any written rule or regulation similar to either of the notices, or any local custom having the force of law as to carrying lights, existed in the port of Bombay.

Act XXII. of 1855 is "an Act for the Regulation of Ports and Port Dues." The 6th Section empowered the Local Governor to appoint an officer to be Conservator of every port, &c., subject to the Act, but directed that in ports where there is a Master Attendant such Master Attendant shall be the Conservator, and that "the Conservator shall be subject to the control of the Local Government, or of any intermediate authority which that Government may appoint." The 7th Section enacted that "The Local Government, with the sanction of the Governor General of India in Council, may from time to time make such Port Rules. not inconsistent with this Act, as it may think necessary for any of the following purposes, namely"—Then followed thirteen items, of which the two last were as follows:—"12, For regulating the use of fires and lights within any such port. 13. For enforcing and regulating the use of signal lights by vessels at night in any such port, river, or channel." The 10th Section enacted that "The Conservator of any port subject to this Act may in respect of any vessel within such port, &c., give directions for carrying into effect any Port Rule in force within such Port." That is not a power for the Conservator to make new Port Rules, but merely authorises him to give directions for carrying into effect Port Rules in force within the Port. Whether there was any rule or usage in Bombay Harbour in or before 1855 as to carrying lights at night, as already observed, does not appear. The Act (XXII. of 1855) does not in express terms abolish any such rule or usage if it existed. A new rule, duly made under the Act, would, however, so far as it was inconsistent with a former rule or usage, necessarily supersede it. Exhibit No. 7, already mentioned as comprising certain Port Rules, made by the Government of Bombay, with the sanction of the Governor General in Council, and promulgated on the 29th August 1859, contained, in its 13th

Clause, the following rule:—"No private vessels are to hoist *signal lights* at night, or to fire any great guns or muskets at the hours of sunrise or sunset, or at any other time, *without permission,* excepting in cases when requiring assistance." The scope of that rule, and the intended meaning of the term "signal lights," as used in it, are not so clear as might be wished. That term, we have seen, occurs also in the 13th item of the 7th Section of the Act. The 12th item is conversant of "fires and lights." In it the word "lights" probably denotes lights used below or on deck, and the term "signal lights" used in the 13th item in all probability means lights used aloft. It would certainly include lights employed in what is ordinarily called signalling, *i.e.*, for conducting communications with other ships or with the shore, but it is not quite clear, and I offer no opinion upon the question, whether it would include a fixed light carried aloft during the night, in order to indicate the position of the vessel which carries it, with a general view to the prevention of collision of other vessels with her. I shall merely observe that I do not find the term "signal lights" used in the Admiralty Regulations (relating to lights carried for the purpose of preventing collision) made under the authority of the Statute 14 & 15 Vic., c. 79, s. 26, or in those made under the Merchant Shipping Act of 1854, section 295 (since repealed), or in the rules in Table C. of the Merchant Shipping Act of 1862. The word "light" only is used, and the prefix "signal" is omitted. Even, however, assuming that the Bombay Government Rule by "signal lights" intended to designate not only lights employed as a means of communication with other vessels or with the shore, but also lights carried aloft throughout the night to indicate the position of the vessel *carrying* them for the purpose of averting collision, it would, I think, be altogether straining the rule to hold that, by the prohibition *to hoist signal lights* by night, it was intended by the Bombay Government, under the sanction of the Government of India, to prevent a vessel from temporarily *showing* a light, say over the quarter or elsewhere, in order to give, notice of her position to a vessel approaching her so nearly and steering such a course, as that collision must probably

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

take place unless such a measure be resorted to. To hold that such a prohibition was intended would be, I think, not only to do violence to the language of the rule, but also to attribute to Government the unreasonable intention of denying to vessels the right of self-preservation on a sudden emergency, and, moreover, as I shall presently show, to abrogate, so far as regards the harbour of Bombay, a fixed principle of general maritime law.

Again, admitting that the Master Attendant cannot *immediately*, under Act XXII. of 1855, make a new or substantive rule, yet the rule, contained in clause 13 of the Government Rules, contemplates the hoisting of signal lights, whatever that term may mean, by vessels, with 'permission' or in cases when requiring assistance. The general administration of affairs connected with the harbour and shipping seems, on a purview of the Act and of the Government Rules founded upon it, to be vested in the Master Attendant, and, therefore, although the rule does not expressly say so, I think that the permission intended must be his permission. It appears unreasonable to suppose that any course so highly inconvenient as an application to Government itself for permission was intended. If they have no higher function, the Light Notices of 1859 and 1866 would operate at least as permission to the vessels described in those notices to carry a light. The words "or in cases when requiring assistance" suggest this observation:—That those words may mean that in a sudden emergency of any kind, a vessel may hoist a signal light. That is, no doubt, a somewhat free paraphrase for the expression "or in cases when requiring assistance." Very probably what the framer of the rule intended to lay down by it was, that vessels in Bombay harbour should carry the lights to be prescribed, whatsoever they might be, by the Master Attendant, and no other lights except in cases of imperative necessity, and that in those cases they might hoist such lights as the special occasion might require. If this were the intention, the language of the rule has not been felicitously chosen, and be the intention what it may, the language is deficient in perspicuity, and needs amendment.

Whatever difficulty there may be in the construction of the rule, it, if known to the plaintiff, which I doubt, most certainly has not misled him into the belief that he was not bound to exhibit a light. He seems to have been acquainted with the Light Notices. At all events, in his plaint, as I have already mentioned, he studiously avers that "at the time of the said collision, the said bagalo had a proper light hung high over the deck, and in such a position as to be seen from a considerable distance from vessels approaching from all sides, and such and so placed as is usual of the class and size of the said bagalo in the harbour of Bombay under the regulations in force in the said harbour." As it may be contended that this averment, albeit on solemn affirmation, is mere surplusage in pleading, I have thus fully discussed the Port Rules of Government, and the Light Notices of the Master Attendant, and shall also presently refer to general maritime law with respect to lights; but the plaintiff did not limit himself to an averment in his plaint as to his vessel carrying a light. The main point to which the testimony of his witnesses was directed was the establishment of that alleged fact, and when giving his own evidence he, on cross-examination, said: "I knew the Sarkar's regulations about anchoring the bagalo, and also as to carrying a light, and therefore the light was lighted. My light was 17 feet from the hull, by the hull I mean the keel" (probably meaning kelson) "of the vessel. I don't know the regulation as to the height of the light, but I am in the habit of carrying a light. My light could be seen at the distance of a mile," and he said more to the same effect on re-examination. Whatever may be the true construction of the Port Rule made by Government as to signal lights, however small the legal value attachable to the Light Notices issued by the Master Attendant may be, I am satisfied, as already stated, that the Port Rule was not intended to interfere or dispense with what I shall now proceed to show was required by general maritime law of a vessel so situated as the *Khudabakash*, was on the night of the 24th April 1866, when the *Emeu* was approaching her.

From *The Rose* (*q*), *The Swea* (*r*), *The Sarah* (*s*),

(*q*) 2 Notes of Cases 101; S. C. 2 Wm. Rob. 2.
(*r*) 4 Notes of Cases 97 n. (*s*) Ibid, 98 n.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

The Londonderry (*t*), and *The Osmanli* (*u*), it would appear that independently of special regulation or legislation, there is no general obligation by maritime law, or what may perhaps not improperly be called the common law of the sea, on sailing vessels to *carry* a light throughout the night, although, under particular circumstances, for the sake of avoiding a misfortune, it may become their duty to *carry* or *show* a light.

In *The Londonderry* Mr. Justice Burton, in giving the judgment of the Court of Delegates in affirmance of the decision of the Court of Admiralty in Ireland, regretted that it was not incumbent on sailing vessels to hoist lights, and expressed a hope (since realised, so far as regards the United Kingdom,) that the law may be reformed in that respect. In the case of *The Swea*, the vessel injured was at anchor in the Bristol Channel. Dr. Lushington said: "It has never been laid down by you (the Trinity Masters) as a general rule that a vessel at anchor should have a light at any time. But it is said it is the custom in the Bristol Channel to show a light. Custom is a very indefinite term. As I understand it in this case, it was a general practice, not that it is universally so." A light was held to be an unnecessary ingredient in that case, but I may observe that the injured vessel was lying at anchor at some distance below Cardiff, where the Bristol Channel is from ten to twelve miles in width. In *The Sarah*, the injured vessel was lying at anchor in the Downs, two miles from the Gull Light, and the same distance from the shore. Therefore neither *The Swea* nor *The Sarah* is in point here. *The Iron Duke* (*v*) is a case deserving of attention. She was a powerful iron steamer of 600 tons, carrying the Irish mail in 1844 from Kingstown, had three strong lights, one at her foremast-head, and one at each bow, and was going at full speed, about twelve knots per hour, the wind behind; there was only one man on the look-out standing upon a raised forecastle. The night was dark, but not hazy. About ten miles from Point Lynas light she

(*t*) 4 Notes of Cases, Appx. XLII.
(*u*) 7 Notes of Cases 509.
(*v*) 4 Notes of Cases 94, 585

came into collision with the *Parana*, a brig of 200 tons. The latter almost immediately went down, her master and five of the crew being drowned. She had a valuable cargo, carried no light aloft, was close-hauled on the starboard tack, and was going at the rate of four or five knots an hour. The mate saw the *Iron Duke* ten minutes before two o'clock A.M., six miles off, he returned to the deck some time afterwards, and then took the light (a good one) from the binnacle, and exhibited it for about five minutes over the nearest quarter. There was some uncertainty, however, as to the length of time during which the light was so shown, and it was not observed on board the *Iron Duke*. Dr. Lushington, after stating that there was no general rule that sailing vessels should *carry* a light, left it to the Trinity Masters to say whether, "if it was not the duty of the *Parana* to *carry* a light aloft, it was her duty to have exhibited a light, that is to say, upon descrying the steamer she ought to have been prepared with a light, and to have exhibited it." The Trinity Masters said: "We think the *Parana* did nothing wrong. Our opinion is that she did show a light, although it was but a very short time before the collision. Sailing vessels are not required to show a light. There is a rule that if a vessel wants a pilot she shows a light, and it is the rule that pilots should show a light; but under common circumstances sailing vessels do not show lights, and are not required to do so." They then censured the *Iron Duke* for the speed at which she was propelled, with an insufficient look-out, in a space where many vessels were sailing to and from Liverpool, and the Court pronounced against her for the full damage, £18,000, and costs. The Privy Council on appeal affirmed the decision on the latter grounds, but took a different view from the Trinity Masters as to the obligation on the *Parana* to exhibit a light. Baron Parke delivered their judgment. After stating that the only question on which they had any serious doubt was whether the light was held out in due time; he said that, upon a careful review of the evidence, their Lordships thought it was, and then he proceeded thus: "They are not to be considered as sanctioning the proposition that it was not necessary for the crew of the *Parana* to exhibit a

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

light in order to give notice to the steamer of the situation of their vessel, under the circumstances of the case." He then added that the mate and two other men of the *Parana* "all give evidence as to their understanding that this was their duty whenever a steamer was nearing their course, and I agree with the Solicitor General that, as it was the duty of the steamer to steer clear of the sailing vessel, *it is fair and reasonable, and common sense requires, that the sailing vessel should take this mode of giving to the crew of the steamer notice of its position*, in order to enable it the better to perform its duty. But this need not be done till the steamer is nearing the course of the sailing vessel, and the persons navigating the sailing vessel have reasonable ground to believe there is a risk of coming in collision with her. If their Lordships adopt this rule, the evidence they think shows that sufficient was done in this case." He then referred to the facts which I have stated, and to the exhibition of the binnacle lamp over the quarter, and said: "The precise number of minutes, like any other question of time, is not, and cannot be, accurately proved; the witnesses differ about it; but a very short period was quite enough, if the light had been seen, to have enabled the steamer to alter her course, and have avoided the collision, when it is recollected that she was moving at the rate of twelve miles an hour, and consequently traversing a space of 352 yards in a single minute, and a minute before the collision the *Iron Duke* was at that distance from the *Parana*. Their Lordships therefore being perfectly satisfied that the crew of the steamer were to blame in not keeping the good look-out required on such a night, and at such a speed, and thinking that no blame justly attaches to that of the brig, who did exhibit a light as soon as they had reason to believe it was required, are of opinion that the sentence of the Court below should be affirmed, and they cannot refuse to give the respondents their costs."

A case strongly resembling the present one is *The Victoria* (*w*). The *Victoria*, a collier brig of 163 tons, in January 1848, at half-past two A.M., ran down the *Three Betseys*

(*w*) 6 Notes of Cases, 176; S. C. 3 Wm. Rob. 49.

(also a collier), of 96 tons, cutting her down to the water's edge as she lay at anchor in the usual track of vessels in six fathoms water in the S.W. Reach, the middle light bearing N.E. by N., distant about two miles. Several other vessels lying at anchor in and about the same place (the Swin), which showed or carried lights, were safely passed by the *Victoria*, which was going at five to six knots. Dr. Lushington, after laying it down that the *onus probandi* lies with the vessel in motion, and that she is *primâ facie* bound to show a sufficient cause for coming in contact with the vessel which was stationary, and therefore, comparatively helpless, also that there is no general obligation of maritime law on vessels at anchor to carry or exhibit a light "although circumstances may exist which would render it obligatory upon the master of a vessel at anchor to exhibit a light for his own safety and for the safety of other vessels," said that he entertained no doubt whatever that "no light was displayed on board the *Three Betseys* sufficient to warn other vessels approaching to the position in which she was anchored." He continued: "I now come to the more important consideration in the case, the decision of which must rest with you (the Trinity Masters), namely, whether, looking to the season of the year in which this collision took place, the state of the night, and the locality in which the *Three Betseys* was anchored, it was not obligatory upon the master, as a matter of reasonable precaution, to have carried and exhibited an efficient light. If you are of opinion that the carrying and exhibiting such a light would have tended to prevent the collision, I cannot but think that it was a duty imposed upon him to have done so, and for this reason, that all persons are bound to take due and proper care to avoid an accident, and no man can justly complain of an accident that happens to himself, if by reasonable and proper precaution he could have prevented it. That the carrying a light, upon the night when this collision took place, was a necessary and proper precaution is, in a certain degree, admitted by the persons on board the *Three Betseys*, because they state in their reply, to which I have already adverted, that they did carry a light in the first instance, and were about to renew

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

it when the two vessels came into collision. If this be so, it appears to me that it was only owing to a want of proper care on their part that the light was not actually burning at the time."

These latter remarks as to the admission on the part of the *Three Betseys* that the carrying a light was a necessary and proper precaution, apply still more strongly in the present case, in which the plaint and the evidence of the plaintiff and almost all of his witnesses were specially directed to establish that the *Khudabakash* did carry a light.

The Trinity Masters were of opinion that the *Victoria* was to blame for proceeding through such a locality at too great a speed considering all the circumstances of the case, and that the *Three Betseys* was to blame for not having an effective light at the period of the collision. The Court of Admiralty accordingly ruled that the damage must be divided between the two vessels.

A similar ruling was made in *The Saxonia* v. *The Eclipse* (*x*). The collision between them occurred in the Solent in 1860, but though subsequent to the passing of the Merchant Shipping Act of 1854, the case was not decided upon that Act, or the Admiralty Regulation made under its 295th section with regard to lights, because the *Saxonia* was a foreign vessel. The general maritime law was resorted to. The *Saxonia* was a powerful steamer of 2,200 tons, going at the time at nine knots. The *Eclipse* was a British barque of 254 tons, on the port tack, close-hauled, and barely stemming the tide. The moon was about 43 hours past the full, but the night was cloudy and dark. The Privy Council held both vessels to blame, the *Eclipse* for not exhibiting in sufficient time an effective light to indicate her position,—she had a green starboard light, burning exceedingly dimly, and showed a flare-up light, but not until the collision was inevitable or almost so,—and the *Saxonia* for continuing her speed of nine knots until the collision, and for not easing and stopping her engines or giving way to the *Eclipse*.

(*x*) 1 Lushington 410; S. C. 8 Jur. N. S. 315.

Sir John Romilly, in giving the judgment of the Privy Council, said: "Though the close-hauled vessel is not bound to give way, she is nevertheless bound to show some proper and sufficient light, in sufficient time to enable the steam-ship or other vessel, whose duty it is to give way, to avoid any collision. No blame can attach to a vessel for running foul of another vessel, if it has been impossible to distinguish it until the collision was inevitable. This is not a question of green or red light, but of no light at all. *A vessel at anchor or a fishing boat is bound by the general rules of the sea to exhibit a light, so as to afford the vessels, whose duty it is to avoid her, the means of doing so.*"

The Lords of the Admiralty, in February 1858, made a Regulation, under s. 295 of the Merchant Shipping Act of 1854, that "All sea-going sailing vessels, when under way or being towed, shall, between sunset and sunrise exhibit a green light on the starboard side, and a red light on the port side," and on the 26th October 1858 declared that that regulation, so far as it related to the lights to be carried, does not apply to open boats, or to vessels usually employed in fisheries. In *The Olivia* (*y*), it was held by the Court of Admiralty in 1862 that though a fishing vessel was not bound *to carry* the coloured lights described by the Admiralty Regulation of February 1858, yet she was bound by maritime law *to show* a light in reasonable time to an approaching vessel, which latter being also to blame in another respect, the damage of the collision was divided between her and the fishing vessel whose proprietors brought the suit.

The three cases last mentioned were suits in the Court of Admiralty, and were all disposed of upon the general maritime law, and not upon any Statute or Admiralty Regulation founded upon a Statute. In each of the three, both vessels concerned were in fault. In *Dowell* v. *The Steam Navigation Company* (*z*), Lord Campbell, C. J., said: "According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault, the loss is equally divided (See 12 Moore P. C. C. 331); but in a Court of

(*y*) 1 Lushington 497. (*z*) 26 L. J. N. S. Q. B. 59-60.

1869

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

Common Law the plaintiff has no remedy if his negligence in any degree contributed to the accident," (*i. e.*, directly, not remotely, contributed to the accident). The present suit has been brought as an ordinary civil action, and has not been entered as brought under our Admiralty jurisdiction. A question would have arisen, if it appeared that both the *Emeu* and the *Khudabakash* were in fault, whether the loss should be dealt with according to the Admiralty or the Common Law system. I shall not express any opinion upon that question, as, in the view which I take of this case, it does not arise. In *Dowell* v. *The Steam Navigation Company*, a collier brig was sunk by the *Trident* steamer, belonging to the defendants, in 1853. The steamer the jury found most to blame, as going at too great a speed on a dark night; but they also were of opinion that the collier was not seen by the steamer till within two or three ships' lengths, which arose from "the fault of the collier in not continuing the light till the danger was passed," and this the Court thought would be a good defence for the steamer at common law under the plea of not guilty.

And, independently of the Common Law, the Court also thought that it was a good defence, because the collier did not properly observe the Admiralty Regulation, made under the authority of the 26th Section of the Statute 14 & 15 Vic., c. 79, requiring "sailing vessels, approaching or being approached by any other vessel, to show a bright light, in such a position as can be seen by such vessel, and in sufficient time to avoid the collision," and the 28th Section of the same Statute enacted that "if in any case of a collision" it appeared to be "occasioned by the non-observance of the rule to be made" by the Lords of the Admiralty "with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed, shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court, before which the case is tried, that the circumstances of the case were such as to justify a departure from the rule."

An earlier case, *Morrison* v. *The General Steam Navi-*

gation Company (*a*), decided upon the same Admiralty Regulation and Statute does not appear to have been cited in the last case. In November 1852 the *Albion*, a steamer belonging to the defendants, going at ten miles an hour, ran into the plaintiff's vessel *Valiant*, a collier brig, at 4 A.M., lying at anchor in the Thames, in Gravesend Reach, towards the south shore, near a place where colliers usually bring up. The Chief Baron (Pollock) directed the jury that the Admiralty Regulations applied to the lights of sailing vessels within the port of London; and, therefore, if the accident was owing to the *Valiant* not having a light while at anchor in the fairway, the plaintiff was not entitled to recover; that, if the accident was occasioned by negligence on both sides, neither party could maintain an action, and he put it to the jury whether the fact of the *Valiant* not having a light contributed to the accident, and whether she was in the fairway of the river. The jury found for the defendants, stating that the *Valiant* was in the fairway of the river, and that if she had a light it would have tended to lessen the danger. The Court of Exchequer unanimously refused to set that verdict aside. In giving their judgment, Pollock, C.B., said: "The point, as left to the jury, involved the question whether the defendants themselves had contributed to the accident by their own carelessness. We decidedly think that no change has been effected by the Admiralty regulations in this respect, and that persons navigating ships are bound to keep a look-out just as they were before these regulations were made; and if it could be clearly established that a vessel having no light had been run into by another vessel from sheer carelessness and negligence in not keeping a good look-out, we agree with the plaintiff's counsel that the injured party could recover. But here that matter was left to the jury, who distinctly found that the defendants' steam vessel was in a part of the stream where she had a right to be, and that the accident arose from the plaintiff's own negligence. The point was therefore left to them, substantially involving the law as it stood before the statute, and still is, namely,

(*a*) 22 L. J. N. S. Exch. 233; S. C. 8 Exch. 733.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

that if the conduct of the party complaining has either occasioned, or contributed to the occasioning of the loss, he is no more entitled to recover now than he would have been before the statute was passed, and these regulations made."

The doctrine laid down by the Privy Council in *The Telegraph* (*b*) substantially agrees with that of the Court of Exchequer. They held that the regulations must be literally complied with, and that if a collision occurs *which is attributable to a departure from the regulations*, the party so departing cannot recover damages.

But Sir John Patteson, in delivering the judgment of the Council, said:—"Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel, and in these and other cases that might be put, the party would be entitled to recover, although the regulations had not been complied with. (Acc. 1 Spink 31, 17 Jur. 1037, Swabey 88, 10 Moore P. C. C. 472.) The collision must be clearly traced to a departure from the regulations, and it is our desire that it should be understood that those who depart from them do so at their own peril." (Acc. 1 Spink 96, 298, 18 Jur. 296, Swabey 20, 101, 120, 465, 519, 2 Jur. N. S. 620.) The regulation required that vessels at anchor in a roadstead or fairway should exhibit a light at the masthead. The *Palermo* barque was at anchor at 10 P.M., in a proper place, in Belfast Lough, in the fairway however, with a light hoisted, not at the masthead, but in the larboard mizen rigging. The *Telegraph* steamer, going along at a proper speed, and with a good look-out, ran into the *Palermo*. Dr. Lushington, with the advice of the Trinity Masters, decreed in favour of the *Palermo*, but the Privy Council reversed that decree with costs, being of opinion that the accident was attributable to the *Palermo's* departure from the regulation in not placing her light at the masthead.

(*b*) 8 Moo. P. C. C. 167, 176.

Morgan v. *Sim* (*c*), decided on the 15th December 1857 by the Privy Council, the members present being Lord Wensleydale, Mr. Pemberton Leigh (Lord Kingsdown), and Sir John Dodson—a very strong Court, who affirmed the decision of Dr. Lushington in the Admiralty Court—was much relied upon for the defendants. The *City of London*, steamer, on her way from London to Aberdeen, ran into the *Celerity*, smack. The latter went down head foremost in less than two minutes—the mate and an apprentice were drowned; the master and the rest of the crew were saved. The smack neither carried nor showed a light. The collision occurred at seven o'clock in the evening, the smack being hove to at the mouth of the Thames, at the lower part of the Gunfleet sand, to reef her mainsail. The weather was clear, the moon shining brightly, and the wind was blowing hard. Dr. Lushington directed the Trinity Masters that it was not because it was a bright night that it was unnecessary to obey the Admiralty's regulation, made under the Statute 14 & 15 Vic., c. 79, s. 295, requiring the exhibition of a light by a vessel hove-to. He, in substance, put two questions to them: 1.—Whether there was a good look-out on board the steamer. 2.—Whether, if there had been a light exhibited on board the smack, the steamer would have seen it, and so, in all probability, have avoided the collision. The Trinity Masters were of opinion that there were no circumstances to justify the smack's departure from the regulation, and that, if a light had been shown, there would, in all probability, have been no collision. This, Dr. Lushington held, a good defence, and decreed for the steamer with costs. In his judgment, given on behalf of the Privy Council, affirming that decree, Lord Wensleydale, after noticing that the Trinity Masters had not distinctly answered the first question, said "but they have answered very distinctly the second question—which is also an answer to the appellant's case—namely, that, if a light had been shown, there would, in all probability, have been no collision," and added: "The Sailing Masters before the Privy Council were not satisfied

(*c*) Swabey 248, 11 Moore P. C. C. 307.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

on the evidence that the steamer was to blame, but were satisfied upon the other question that if a light had been exhibited on board the smack, then, in all probability, the collision would have been avoided." The Privy Council there clearly held that the *onus probandi* lay upon the party seeking to recover compensation for damage occasioned by a collision, and that he must establish that the loss was attributable to the neglect or default of the other party.

I have thus fully reviewed the leading English authorities on the subject of lights, because they appear to me to show a growing disposition on the part of the English Courts to insist strictly on the exhibition of lights, in cases arising as well on the general maritime law as on the Admiralty Regulations, where that course is likely to avert collisions.

It has been seen that the cases are divisible into two classes: 1—Those governed by general maritime law. 2—Those governed by Admiralty Regulations founded on Statutes. This latter class is not so directly applicable to the present case as the first class, even if I assume that the Light Notices issued by the Master Attendant may be considered as deriving authority from Act XXII. of 1855. That Act contains no such stringent clauses as the 28th section of the Statute 14 & 15 Vic., c. 79, and s. 298 of the Merchant Shipping Act of 1854, or as Sections 29 and 32 of the Merchant Shipping Act of 1862, which Act has superseded the Admiralty Regulations, and contains in its Table C. the rules at present in force in the United Kingdom as to the lights which steamers, sailing vessels in motion or at anchor, and fishing vessels and open boats shall carry or exhibit. So far, however, as the cases upon the Admiralty Regulations and upon those statutes involve general principles, they are worthy of attention in this case. Of the decisions quoted, the most apposite here are those which were based on general maritime law only.

In the second edition of Pritchard's Admiralty Digest, Vol. I., are collected some Irish (page 146, paras. 173, 177, page 152, para. 221,) and several American cases (pages 145, 146, notes 64, 65, 68, 69, 71, 72, 74, 76, 77), the result of which

may be shortly stated as similar to that of the English cases—viz., that although there is no general rule of maritime law (independently of positive regulation or enactment) that a sailing vessel either under way or at anchor must at night always carry a light, yet that the Court will go some way to treat the dark boat as the wrong-doer, and that if a vessel be either under way or at anchor at night in a channel, fairway, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or to show a light, in order to indicate her position when other vessels are approaching, and in sufficient time to enable them to avoid her; and that if common prudence require that a vessel lying in a particular place should show a light, it will be no excuse that the common practice of the harbour or river is to neglect to do so.

The *Khudabakash* was, beyond all doubt, anchored in the fairway, about two or three cables' lengths to the south of the fishing stakes, and directly in the path of vessels proceeding towards the P. and O. Company's moorings and thence up the harbour. She lay four or five cables' lengths south of the southwardmost of the P. and O. Company's moorings, and about a mile to E.S.E. of Gibbet (Cross) Island. A cable's length is 120 fathoms (240 yards). A European ship lay between her and Gibbet Island. Mr. Cork, the first Assistant Master Attendant, says that the narrowest part of the fairway in the harbour is abreast of Gibbet Island. It extends about one mile due east, he says, from that island. The *Khudabakash* lay outside all of the other bagalos, of which there were many lying at anchor between her and the Mazagon shore. The night was what sailors describe as a clear dark night. Captain Anderson, who then commanded the *Emeu*, adds that it was rather hazy down upon the water. The *Emeu* was proceeding at the pace called "dead slow" from off the Apollo Bunder up harbour in the direction of her moorings. "Dead slow" with the *Emeu* is said to be about three knots per hour, her half-speed being about five knots. Captain Anderson says that she was steaming badly. Captain Henry, who was on board, but not taking any part in the navigation, said indeed

1869.
MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

that she might at the time have been going at half-speed, but he does not speak at all positively on that point, and adds, that he did not pay particular attention to it. David Bilham, the carpenter of the *Emeu*, said that she was going at a tidy pace through the water, he did not know whether at full-speed or not, but he thought not. I prefer, however, on this point the evidence of Captain Anderson, and of the pilot, whose business it was to give the order as to the rate of speed, and who must have been cognisant of it. They both say positively that she was going dead slow, and Mr. Mowbray Robinson, the third officer of the *Emeu*, also says that she was going quite slow. It is not denied that she had the proper lights up which the law requires a steamer to carry. The state of tide was young flood, which had just begun to make, and the shipping at anchor, including the *Khudabakash*, were beginning to swing with it. She therefore was lying partly across the tideway, with her head towards Boree Bunder, and thus nearly presented her broadside to a vessel coming up harbour. At that part of the fairway where the collision occurred the pilot has deposed (and his evidence on that point has not been impeached) that the *Emeu* could not at that time of tide have had more than two feet of water under her keel. There is reason to believe that the harbour is silting up in that locality. There was little or no wind. Shortly after the *Emeu* left the vicinity of the Apollo Bunder, the pilot, who up to that time had been on the bridge with Captain Anderson, finding it had become too dark to see well ahead from that position, proposed to go to the forecastle, in order that he might see more distinctly. Captain Anderson assenting, the pilot went to the forecastle, Captain Anderson remaining on the bridge to attend to the steering, the wheel being on the bridge. The pilot joined the chief officer, Mr. Smith, on the port side of the forecastle, who was on the look-out there. The pilot was not quite positive as to the time, but was under the impression that the collision took place about 20 or 25 minutes after he so joined the chief officer. The third officer, and Archbold, the gunner, were on the look-out on the starboard side of the forecastle. A native seaman was stationed on the

jib-boom, also on the look-out. He and Archbold have not been produced at the trial, and I should certainly have preferred that they had been. But it has been stated that both of them were in attendance at the Court of Inquiry, and that Archbold was examined there. An attempt was made at the trial before me to give, on behalf of the plaintiff, evidence of something which Archbold is alleged to have said at the Court of Inquiry, but such a course being contrary to the rules of evidence, permission was refused. [Here the reasons for the absence of Archbold and Mr. Smith, the chief officer of the *Emeu*, were discussed by the Court, and held to be sufficient.]

The pilot and third officer who were on the look-out, and the carpenter, Bilham, who was also on the forecastle, in readiness to let go the anchor, and Captain Anderson have been examined for the defence. They are unanimous in stating that the *Khudabakash* did not carry or display any light, that is to say, until, the pilot says, about two seconds before the *Emeu* struck her, when a torch was held up over her port side. He is unable to speak with precision as to time, but says that, about five or ten seconds previously to the collision, the *Khudabakash* was, by the third officer, reported to the chief officer, and to him before he saw her, but, certainly, the pilot adds, not in sufficient time to enable him to keep clear of her. He proceeds: "Almost the next instant after she was reported I heard the noise (a shout raised by the crew of the *Khudabakash*) which I have mentioned. I ordered the helm to be put hard a-port. To the best of my knowledge that was done. That was the right thing to do under the circumstances, in order to go under her stern, as she was swinging with her head towards Boree Bunder. When I first saw the bagalo there was no light whatever on it; if there had been a lamp lighted a foot square we should have seen it. About two seconds before we struck her they showed a torch over her port side (the side nearest the *Emeu*). We struck her about 10 or 12 feet, or perhaps a little more from the night-heads, and a short distance before the foremast." The order to port the helm, it is not denied,

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

was a proper order under the circumstances for the purpose of going, if possible, astern of the *Khudabakash*, which was what her crew called out to the *Emeu* to do.

On cross-examination, the pilot, after describing the position of the *Khudabakash*, said: "There was a ship lying nearer to Gibbet Island. To avoid the ship I had to port the helm, and keep further to the eastward, and, in so doing, the bagalo being right in the way, we came upon it;" and again, "I think it was the third officer or the warrant officer on the starboard side who first reported her. She was reported first to the chief officer, with whom I was then standing on the port side of the forecastle. She was, I believe, in fact seen by the persons on both sides almost simultaneously. We could have reversed the engines, and we did so. I gave the order to port the helm and to turn astern (*i.e.*, reverse the engines) almost in one breath." I should here observe that an order to port or starboard the helm being on board the *Emeu* conveyed to the persons on the bridge by coloured lights exhibited on the forecastle, would reach them more rapidly than an order to stop or reverse the engines, which should be passed on to them by word of mouth. Captain Henry stated that he perceived that the engines stopped before the collision actually took place. He, the pilot, and Captain Anderson all concur in saying that if the *Emeu* had been going at half-speed at the moment of the collision, she must have cut the *Khudabakash* in two, or run right over her. Captain Anderson says that, "reversing the engines will check the way, but will not instantly stop it in the case of a large and powerful steamer. The *Emeu* had some cargo on board, to the best of my recollection she was half laden." I may here remark that the circumstance of her having cargo on board would cause her to hold her way longer than if she were unladen, and would increase the difficulty of stopping her. Captain Anderson added, "I saw that the helm was put hard a-port without any loss of time whatever, when the signal was made from the forecastle." In a previous part of his evidence he said: "We did port the helm. That might be a minute or less before the collision. It was a very short time,—almost

immediately after porting the helm the engines were stopped. I don't remember whether they were reversed." This was because immediately on the stopping of the engines Captain Anderson left the bridge, and went forward. Mr. Mowbray Robinson, the third officer of the *Emeu*, who gave his evidence with great caution and fairness, was, in consequence of his position on the starboard side of the forecastle, and of his being the person on board the *Emeu* who first sighted the *Khudabakash*, a witness of much importance. The substance of his evidence, as gathered from his direct, cross, and re-examination, was that he first saw her outside the shipping and in the fairway nearly ahead, but slightly on the starboard bow of the *Emeu*, at a distance of 200 or 300 yards from that vessel. He immediately reported the *Khudabakash* to the chief officer, who was standing on the port side of the *Emeu*, close to the pilot. Mr. Robinson did not know whether the pilot heard him do so. The chief officer gave no order, nor was it his business to give any. It was the pilot's duty to give the necessary orders. Mr. Robinson heard the pilot give an order to port the helm, and almost in the same breath to turn astern. There was not then time to avoid the collision. The pilot's order to port the helm was given a very short time after Mr. Robinson had reported her, but as he thought not until he had time to return to his post on the port side. Mr. Robinson was of opinion, but would not positively swear, that if the helm of the *Emeu* had been ported when he first reported the *Khudabakash*, the *Emeu* might have cleared her. The *Emeu* was going so slowly, viz., three or four knots an hour, that it was possible she might not, although the probability was that she would, have answered her helm with sufficient readiness to clear the *Khudabakash*. His report to the chief officer was made about three minutes before the collision. Mr. Robinson saw no light in the *Khudabakash* when he first sighted her, or even afterwards, when the *Emeu* had come within twenty or thirty yards of her. He added that the *Emeu* would take a longer time to answer her helm in such shallow water as that in which she was, than in deeper water.

1869.

MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

The evidence of the pilot shows distinctly that he did hear Mr. Robinson report the *Khudabakash* to the chief officer.

The plaintiff deposed that the *Khudabakash* carried always at night a bright light in a large lantern, visible all round for a mile, and that previously to his going on shore, about six P.M. on the evening of the collision, he had seen that light suspended aloft from one of the yards in its usual place between the masts. The four witnesses, who alleged that they were seamen on board the *Khudabakash* at the time of the collision, also deposed to the same effect as to the nature and position of the light.

Six other witnesses, who alleged that they were on board other native craft in the vicinity of the *Khudabakash* at the time of the collision, also depose that the *Khudabakash* was then carrying a good light, visible at a considerable distance.

I am aware of its having been said by Dr. Lushington in *The Vivid* (7 Notes of Cases 129, 130) and other cases (1 Spink 17,213) that "parties may swear that they did not see a light, but that never can be received as evidence in opposition to those who say that they showed a light; because both statements may be true. The light may have been exhibited, and those on board the steamer may not have seen it." That may be very good doctrine where there is no reason for supposing that the witnesses on one side are inferior in credibility to those on the other, but it would be dangerous, and especially so in this country, to act upon such a rule without discrimination.

[His Lordship here reviewed in detail the circumstances which led him to disbelieve the evidence of the plaintiff and his witnesses on this point.]

Assuming, however, what I cannot at all admit, that the *Khudabakash*, situated as she was in the fairway, was not bound in law to display in sufficient time even a temporary light when the *Emeu* was approaching, the plaintiff is not, in my opinion entitled to succeed in this action. Mr. Robinson, one of the look-out, did, when the *Emeu* was at a distance of 200 or 300 yards from the *Khudabakash*, report the latter to

the chief officer in the presence and hearing of the pilot. Taking into consideration that the *Khudabakash* was a small vessel, and neither carried nor showed any light, I think that, on a clear dark night, with, as Captain Anderson says, some haze down upon the water, 200 or 300 yards was about as far as the look-out on board the *Emeu* could be expected to descry the *Khudabakash*. I don't forget that Captain Anderson said that a man keeping a proper look-out might possibly have seen a bagalo at 300 or 400 yards distance without a light. He added, however, that he was not prepared to swear that he must have seen her. Upon a bare conjecture, thus qualified, as to the possibility of seeing a bagalo at 300 or 400 yards without a light, although proceeding from one of the defendants' officers, it would be impossible, where the small vessel in this case was actually descried and reported when 200 or 300 yards off, to found an opinion that the master or crew of the *Emeu* were in fault. I must say, as Dr. Lushington said in a case mentioned in the *The Velasquez* by Sir J. Colvile, I mean *The George* (4 Notes of Cases 163): "But in order to render the owners responsible for the damage done, I must be enabled to come to the clear conclusion that there was actual neglect or want of due care on the part of the master or crew, for if the evidence be nicely balanced, I cannot pronounce affirmatively, so as to saddle the owners with the consequences of this unfortunate collision." There was a pilot on board the *George*. Looking at the evidence of Mr. Robinson, I must say that if there were any default on the part of the *Emeu*, it was the default of the pilot, and not of the master or crew. The pilot heard Mr. Robinson report the *Khudabakash*, and, as already mentioned, Mr. Robinson says that the order to port helm and reverse the engines, if given immediately on that report being made, might have enabled the *Emeu* to clear the *Khudabakash;* but, though those orders were given shortly after the report was made, they were not given until Mr. Robinson had returned to his station on the port side, or in sufficient time to avert the collision. Captain Anderson also says that the order to port was given only about a minute before the collision.

1869.
MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

Going so slowly as the *Emeu* was, she could not have traversed a space of 200 or 300 yards in that time. If Mr. Robinson be right, as I believe him to be, as to the distance at which the *Khudabakash* was when he reported her, it is evident that the order to port was not given until some time afterwards. Here then was some slight delay on the part of the pilot, whose duty it was to give the orders. The cases already cited as to pilots, including *The Atlas* (5 Notes of Cases 50), also mentioned by Sir J. Colvile in *The Velasquez*, show that in such a state of facts, there not being evidence enough to fix any blame upon the master or crew of the *Emeu*, the defendants, her owners, are exonerated. I do not however decide, nor did Mr. Robinson or Captain Anderson positively assert, that beyond all doubt the pilot could have avoided the collision. The slow pace at which very properly the *Emeu* was going, the shallowness of the water and consequent ground attraction, and the fact that such current as there was in the tide, was with her, would all tend to render her immediate obedience to the helm doubtful, and to make it possible that, even supposing it to have been, as the pilot says it was, put hard to port when Mr. Robinson reported the *Khudabakash*, the *Emeu* might not have sufficiently answered it within 200 or 300 yards to go clear of her.

The first issue, as to the alleged negligence of the defendants, must be found for them in the negative. It is unnecessary to come to any finding on the 2nd, 3rd, and 4th issues. The 5th, as to whether the *Khudabakash* was the property of the plaintiff, must be found for him, and in the affirmative. The 6th issue, as to the truth of the statement of the plaintiff that the *Khudabakash* had a light in the position alleged in the plaint, and the 7th, as to whether a light was carried or shown on board the *Khudabakash* in sufficient time to enable the *Emeu* to have avoided her, must respectively be found for the defendants, and in the negative.

The decree therefore must be for the defendants, and without costs, as their learned Counsel now present, Mr. Branson, does not ask for costs. The plaintiff being probably in humble circumstances, Mr. Branson has taken a conside-

rate and proper course, although, if pressed to give costs to the defendants, I might have had some difficulty in refusing such a request, inasmuch as I have reluctantly arrived at the conclusion that there has been, on the part of the plaintiff, both false swearing and subornation. His case has been very ably argued for him by the learned Advocate General, but the facts do not admit of success.

1869.
MUHAMMAD YUSUF v. PENINSULA and ORIENTAL STEAM NAVIGATION COMPANY.

Judgment for defendants without costs.

Attorney for the plaintiff—*G. S. Judge.*

Attorneys for the defendants—*Manisty* and *Hurrell.*

In re INDIAN REGISTRATION ACT, 1866, *and in the matter of the petition of* BAKATRA'M BADRINA'TH.

Aug. 10.

Registration—Promissory note signed by single partner in name of firm—Special agreement under Sec. 52 of Registration Act—Liability of copartners—Act XX. of 1866, Secs. 52 and 53.

The managing partner of a firm executed a promissory note in the name of his firm in favour of the petitioner, and specially registered the note under Sec. 52 of the Indian Registration Act, 1866, signing the special agreement also in the name of his firm.

Held, that, under Sec. 53, the petitioner was only entitled to a decree against the partner who actually signed the note and special agreement.

THE petitioner, on the 4th March 1869, applied to WESTROPP, J., in Chambers, under Sec. 53 of the Indian Registration Act, 1866, for an order to draw up a decree in favour of the petitioner, and against the defendant's firm of "Magnirám Sáhebrám and Company" for Rs. 10,874-7-6, with interest and costs.

The petition, upon which the order was sought, stated that, on the 23rd February 1869, Hazárimal Magnirám, partner in the firm of "Magnirám Sáhebrám," executed an obligation for the payment on demand of Rs. 10,874-7-6 to the petitioner.

That the obligation was duly registered under Act XX. of 1866, and at the same time the following agreement was endorsed upon it:—

1869.

In re IND. REGIS. ACT AND PETITION OF BUKUTRA'M BUDRINA'TH.

"It is agreed between Hazárimal Magnirám, the obligor, and Bakatrám Badrináth, the obligee, of the above obligation, that, in the event of the obligation not being duly satisfied, the amount secured thereby may be summarily recovered in the manner prescribed in Sec. 53 of the Indian Registration Act, 1866.

"(Signed) MAGNIRA'M SA'HEBRA'M,
The handwriting of Hazárimal,
partner to Magnirám Sáhebrám."

That the petitioner had demanded payment of the said sum, but no part thereof had been paid.

The obligation was as follows:—

"*Bombay*, 23*rd February* 1869.

"Received from Bakatrám Badrináth the sum of Rs. 10,874-7-6, which sum we promise to pay him on demand.

"(Signed) MAGNIRA'M SA'HEBRA'M,
The handwriting of Hazárimal,
partner to Magnirám Sáhebrám."

On the back of the obligation there was an endorsement in these words: "Hazárimal Magnirám, partner in the firm of Magnirám Sáhebrám, executing party, shroff, residing at Khara-Koova, admits execution and receipt of consideration.

"(Signed) MAGNIRA'M SA'HEBRA'M,
The handwriting of Hazárimal,
partner to Magnirám Sáhebrám."

WESTROPP, J., upon this petition, signed an order (dated 4th March 1869) for a decree against Hazárimal Magnirám alone for payment of the amount claimed (without interest), and Rs. 41 for costs.

Scoble, on behalf of the petitioner, the obligee, now moved to cancel the last mentioned order, and for an order to draw up a decree against Sáhebrám Kunirám, Mulchand Kunirám, Jagannáth Magnirám, and Hazárimal Magnirám, constituting the firm of Magnirám Sáhebrám, for the amount

1869.

In re IND. REGIS. ACT AND PETITION OF BUKUTRA'M BUDRINA'TH.

claimed. He read an affidavit of the petitioner, in which it was stated that in the former petition Hazárimal Magnirám, managing partner of the firm of Magnirám Sáhebrám, who had executed the obligation on behalf of his firm, was represented as the obligor instead of the firm; that the moneys had been advanced not to Hazárimal Magnirám individually, but to the firm, and were expended for the benefit of the firm. He argued that, as one partner in a firm could bind his copartners by signing a promissory note, and as on that note judgment could be recovered against the individual members of the firm, so one partner and, *à fortiori*, a managing partner could bind his copartners by an agreement under Sec. 52 of the Indian Registration Act, 1866.

WESTROPP, J., said that his practice was to grant decrees in such cases only against the person who had signed the agreement mentioned in Sections 52 and 53 of the Indian Registration Act of 1866, there being nothing in those sections to show that the very summary remedy, thereby given, was so given against any person other than the obligor signing the agreement that the amount secured by the obligation may be summarily recovered. If the obligee wished to proceed against other persons alleged to be liable under the obligation he should do so by ordinary civil suit. Whether he could do so after resorting to summary proceedings against the obligor who alone signed the agreement, it was unnecessary now to express any opinion. Before however finally rejecting Mr. Scoble's application, he (WESTROPP, J.) would inquire from the Prothonotary what the practice of the other Judges was.

Subsequently, having made inquiries, he rejected the application.

Application rejected.

Attorney for the applicant—*Khanderav Moroji.*

1869.
Oct. 15.

Suit No. 376 of 1869.

TUKA'RA'M VITHOJI' .....*Plaintiff.*
KHANDOJI' MALHA'RJI' .....*Defendant.*

Mortgage bond—Collateral security—Registration—Evidence—Act XX of 1866, Secs. 17 and 49.

Held, by COUCH, C. J., following the decisions of the Calcutta and Madras High Courts, but doubting,* that an unregistered bond, whereby immoveable property was pledged by way of collateral security, was admissible in evidence where effect was sought to be given to it for the purpose of obtaining a decree for the money due under it.

THIS suit was brought to recover the sum of Rs. 2,000, and interest thereon at the rate of 12 per cent. per annum from the 30th of August 1866, due from the defendant to the plaintiff, on a bond in the Maráthi language, bearing date the 30th of August 1866.

The plaint was subsequently amended by the insertion of the common money counts.

The bond as translated, was as follows:—

"Mortgage bond (Shrí) the 5th of Shravan Vad, Shake 1788 (30th August 1866), on that day this bond is written. To the creditor, namely. Rájáshri Tukárám bin Vithojí Pátíl Kased, residing at Bombay, (from) the debtor Khandují bin Malhárjí Pátíl and Gangárám bin Khundují Pátíl, residing at Bombay. We give this mortgage bond in writing to you as follows:—We have borrowed from you principal (the sum of) Company's Rupees 2,000. As to the interest thereon we shall go on paying the same at the rate of Rs. one per cent. per mensem. As security for your said money we have mortgaged to you by way of first mortgage our own *mirasi* two houses, which have been purchased by us. The particulars thereof are as follows:—The two houses, bearing Government Nos. 80 (and) 81, have been mortgaged to you. The documents (*i.e.*) deeds of sale of those houses have been deposited with you—(here were inserted the particulars of the deeds)—in all two deeds have been deposited with you. On the day we pay your principal money and interest we shall redeem from you the above two documents and houses. We have received the above money in ready cash in full. Out of (the same), money has been paid to Sadhú

* NOTE.—It has been since held in the case of *Sangappa* v. *Basappa*, decided on the 18th January 1870, by Couch, C. J., and Melvill, J. (to be reported) that where a mortgage bond contained an express promise to pay the money secured by it, such bond, though not registered, could be put in evidence in a suit for the recovery of the money.—ED.

Gúrlay. His bonds which we have redeemed are with you, and one certificate of the house and two deeds of sale and four documents of Sadhú Gúrlay; in all seven documents are with you. Therefore we shall pay your principal money and interest and redeem our documents. There is now no dispute whatever on the part of us both with regard to the payment of the money

We shall pay the principal money, together with the interest, and redeem our houses and documents. We have duly given in writing this mortgage bond in our sound sense and understanding, and of our free will and pleasure. We shall go on paying you the interest for the above-mentioned money (and) interest. We shall pay jointly and severally. We shall not plead the absence of one another. We shall pay the money in this country, or any other country wherever you may demand it. We shall not raise any dispute whatever. We both persons have received the money in ready cash in full. There is now no dispute regarding the payment. We have duly given this mortgage bond in our sound sense and understanding.

(Signed)

I. The signature of Khanduji bin Mulhárji' Pátil, residing at Bombay; his own handwriting; Rs. 2,000, two thousand.

I. (Blank.)

I. (Blank.)

Signatures of attesting witnesses follow here.

The defendant put in a written statement, in which he alleged that the mortgage bond had not been registered, and that therefore, under Sec. 49 of Act XX. of 1866, it could not be enforced.

He further alleged that the transaction was an incomplete one, and that the Rs. 2,000 had never in fact been advanced.

The suit came on for hearing before COUCH, C. J., on the 11th October 1869.

Scoble and *Latham* for the plaintiff.

Marriott and *Macpherson* for the defendant.

On the case being opened, a preliminary issue was raised whether the bond sued upon could be received in evidence.

Macpherson for the defendant:—The bond in question, in the words of Sec. 17 of Act XX. of 1866, "creates an interest in immoveable property." It must therefore under that section be registered, and within four months of its execution under Sec. 22, or within the enlarged time given by Sec. 24 on payment of the penalty. This has not been done. Sec. 49

1869.
TUKA'RA'M VITHOJI' v. KHANDOJI' MALHA'RJI'.

points out the effect of such omission: "No instrument required by Sec. 17 to be registered *shall be received in evidence* in any civil proceeding in any Court * * *, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act." It is submitted that the effect of this section is to prevent an unregistered document of this kind from being used in evidence for any purpose whatever.

Latham for the plaintiff:—There are no words of conveyance in this bond; it therefore does not create any interest in land. It is a mere memorandum accompanying an equitable mortgage. (COUCH, C. J.:—For many years instruments in this form have been enforced by the Courts as instruments creating an interest in land.

Although for the purpose of enforcing rights against the land mentioned in it, the bond is useless, it may be received in evidence and acted upon so far as it is a money bond when the land is pledged as a collateral security merely; this is now established: *Woodoy Chand Janá v. Nitye Mundul* (*a*); *Gopál Pershád* v. *Mussámut Nuzzeránee* (*b*), *Vellayá Pádyáchy* v. *Moorthy Pádyáchy* (*c*.) He also cited *Shankár Bápú* v. *Vishnú Naráyán* (*d*).

Macpherson in reply.

The Chief Justice said that, as he was then advised, he thought the document did create an interest in immoveable property, and that such documents had before been acted upon as creating such an interest, but that he would look into the point, and also consider the cases that had been cited, and directed the case to stand over till the next day the Court sat upon the original side.

15th October—COUCH, C. J., said that he had looked into the cases, and though he did not altogether concur in them, yet that he would follow them, and admit the bond in evidence, leaving it to the defendant, if he wished, to raise the question in the Court of Appeal.

(*a*) 9 Cal. W. Rep. Civ. R. 111. (*b*) 10 Ibid 252.
(*c*) 4 Mad. H. C. Rep. 174. (*d*) 4 Bom. H. C. Rep. A. C. J. 79.

Two further issues were then framed:

I. Whether the defendant received any consideration for the bond.

II. Whether the defendant was indebted to the plaintiffs as in the plaint alleged.

From the evidence adduced for the plaintiff it appeared that there had been dealings between the plaintiff and the defendant, but that the debt arising from them was barred by the law of limitation at the date of the bond, and that at that time no money was advanced by the plaintiff.

COUCH, C. J.:—If the bond is admissible in evidence the plaintiff is entitled to recover upon both issues—on the bond, and on the money counts; for the bond, if admissible, operates as an acknowledgement, so as to take the original debt out of the law of limitation. There is no ground for the contention that the bond does not create an interest in land. As creating a mortgage it is a form in constant use. Looking at the terms of Sec. 49, I should have great difficulty in allowing the bond to be put in evidence were it not for the cases at Calcutta and Madras. The words of the section are very strong. These cases, I may remark, were not argued by counsel, but they may be upheld on the ground that there are two instruments contained in the same paper; one, the contract to pay the money, and the other the mortgage. I give judgment for the plaintiff for Rs. 2,000, and interest at 12 per cent. per annum from the 30th August 1866 to this day. Costs and interest on judgment.

Attorneys for the plaintiffs—*C. E.* and *F. Stanger Leathes.*

Attorneys for the defendant—*Thacker* and *Chalk.*

1869.
Dec. 18-20.

The Proceeds of the Ship "Persia."

EDWARD GARDNER.....*Plaintiff.*

The *Persia*, on a return voyage from Jeddah to Singapore, was driven into Bombay harbour through stress of weather.

The owner, resident at Singapore, though frequently applied to, omitted to furnish funds to repair her, or to pay the wages of the mariners, and, the master being unable to raise funds for these purposes on the credit of the ship or owner, on the application of the mariners, the ship was, in order to levy their wages, sold by the Magistrate under the provisions of Secs. 55 and 56 of Act I. of 1859.

The master, who had been engaged at Singapore, then brought a suit on the Admiralty Side of the High Court, to recover out of the surplus proceeds of the ship his wages up to the time when he could return to Singapore, and his passage-money to that port.

Held, that he was entitled to recover such wages and passage-money.

THIS suit was brought on the Admiralty Side of the High Court by Edward Gardner, master of the ship *Persia*, against the proceeds of that ship in the Registry of the Court to recover Rs. 2,857-8, the balance of his wages due and to become due, under Articles dated the 30th October 1868, up to the 31st December 1869, and Rs. 450, the expense of a passage by steamer from Bombay to Singapore.

The case was heard by WESTROPP, J., in a Division Court on the 18th December 1869.

The facts fully appear in the judgment of the Court.

There was no appearance on behalf of the owner.

Ferguson, for the plaintiff, contended that the plaintiff was entitled to compensation in the nature of wages up to the time when he could return to Singapore, and to the expense of a passage to that port from Bombay, as by the default of the owner he was prevented from bringing the *Persia* back to Singapore. By Sec. 58 of Act I. of 1859 the master is placed in same position as a seaman in respect of the recovery of his wages, &c.; and by Sec 205 of the Merchant Shipping Act 1854 (17 and 18 Vict., c. 104) if by reason of the sale of the ship, or otherwise, a seaman is discharged abroad, the master is bound to find him a passage home;

and if he does not do so, the passage-money is made a charge upon the ship. The analogy of that enactment applies here. He also cited *The Olive* (*a*), *The Elizabeth* (*b*).

Cur. adv. vult.

December 20—WESTROPP, J.:—This is a suit by the master of the ship *Persia* to recover Rs. 2,857-8-0 in respect of wages, and Rs. 450, the expense of a passage by steamer, to Singapore from Bombay.

The ship's articles (dated 30th October 1868) provide for a voyage "from Singapore to Jeddah, or any ports or places in the Indian and Red Seas, until the ship returns to Singapore, as a final port of discharge of the crew; term of service not to exceed twelve months." Edward Gardner, the plaintiff, who was engaged at Singapore, took the command of the *Persia* on the day of the date of the Articles, his wages being 110 dollars per mensem. The vessel arrived at Jeddah on the 22nd February 1869 with pilgrims, having touched in the course of the voyage at Malacca, Penang, Allipee, and Makullah.

She remained at Jeddah until the 11th July 1869, when she sailed. She touched at Hodeida and at Zibbir. The owner, Shaik Selim bin Omar Basharahil (who had, until the vessel came off Aden on the return voyage, been on board the *Persia*), landed in a native craft at Aden, stating that he intended to proceed thence by steamer to Penang; and ordering the plaintiff to take the *Persia* to Penang and Singapore. After passing Aden the *Persia* met with heavy weather, got five feet of water in her hold, and her pumps choked with sand ballast. The passengers came in a body to the master, and required him to run for the nearest port, then Bombay, which was 500 miles off. He complied, and succeeded in reaching Bombay harbour on the 7th or 8th of August 1869. The owner had, when he went ashore at Aden, left his nephew and another Arab on board the

(*a*) Swabey 292; S. C. 2 Prit. Ad. Dig. 670.
(*b*) 2 Dodson 405; S. C. 2 Prit. Ad. Dig. 936.

1869.

In re "THE PERSIA."

Persia as joint supercargoes. That nephew wrote to the owner at Penang by the first mail after the arrival of the *Persia*, advising him of what had occurred. The master wrote to him by the following mail, and five times subsequently, without obtaining any reply. The owner has, however, it has been stated in evidence, written several letters to Shaik Mahomed Abdul Latiff, the ship's agent, who has been aware of the pendency of this suit from its commencement. The master had certain repairs made to the *Persia*, and he not having any funds in hand belonging to the ship, the agent advanced money for that purpose. The ship having been subsequently surveyed on behalf of Government, was condemned as unfit to carry passengers. Neither the master nor agent being able to procure money or means from the owner to provide for the support of the seamen, or for their wages, or to make further repairs, the agent declining to make further advances, and the owner refusing to repay those which the agent had already made, the seamen took proceedings under Secs. 55 and 56 of Act I. of 1859 before the Senior Magistrate of Police for recovery of wages due to them. To levy these wages he sold the ship on the 8th November last. She realised Rs. 12,000. By warrant tested as of the 23rd November in this suit (issued pursuant to an order made in Chambers by Sir Charles Sargent on the 15th November 1869) the Sheriff was ordered to arrest the proceeds of the *Persia* remaining in the hands of the Senior Magistrate; and on the 7th December instant the Sheriff returned that he had so arrested Rs. 9,305-9-3, stated to be the balance of such proceeds.

The plaint in this suit was presented to Sir Charles Sargent on the 15th, and filed on the 16th of November last, that is to say, eight days after the sale of the ship by the Senior Magistrate, which was, I think, reasonable diligence on the part of the master in bringing his suit.

Section 58 of Act I. of 1859 enacts that "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, *or by any law or custom*, any seaman not

being a master has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding, and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

That enactment is similar to Section 191 of the English Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104). Its 185th Section is analogous to Section 51 of Act I. of 1859, which latter is as follows:—"In cases where the service of any seaman terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and also in cases where such service terminates before such period as aforesaid by reason of his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage, granted under the provisions of the Merchant Shipping Act of 1854, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period." Assuming that Section 58 of Act I. of 1859 so operates as to render that Section (51) applicable as well to a master as to a seaman, yet it does not govern this case in which the voyage has not been cut short by wreck or loss of the ship, nor has the master been left in Bombay by reason of any inability or unfitness on his part to proceed on the voyage. I will not say that this is a case of wrongful dismissal of the master by the owner, but it does more nearly resemble such a case than any of the cases specified in Section 51 of Act I. of 1859. It is by reason of the default of the owner to supply sufficient funds to repair the ship that she has been condemned as unfit to carry her passengers to Penang and Singapore; and it is by reason of his default also to supply funds for payment of mariners' wages that her sale has been rendered necessary. His omissions, therefore, have caused the untimely termination of the voyage. In the Treatise on Admiralty Practice, by Messrs. Williams and

1869.

In re "THE PERSIA."

Bruce, at page 164 is this passage: "The claim mentioned in the 10th Section of the Admiralty Court Act (1861), is a claim for *wages earned on board any ship.* Ship, for the purposes of the Act, includes any description of vessel used in navigation not propelled by oars. The words *wages earned on board the ship* would seem to exclude all claims merely in the nature of damages, such as for wrongful dismissal before the termination of the engagement, and the like, and to confine the extension of jurisdiction to wages actually earned on board the ship on which the seaman is employed. Thus the Court would not have jurisdiction to award compensation for a wrongful dismissal in any case in which the seaman was engaged under a special contract; the only jurisdiction which the Court has in such a case being that conferred by the section. The Court, however, has *always* exercised jurisdiction in ordinary wages suits to award to seamen, either as wages, or as compensation in the nature of wages, what at common law would be recoverable only as damages. Thus, when there has been a wrongful dismissal, the Court has awarded to the seaman wages up to the time when the contract would have expired in ordinary course, less such a sum as the seaman may have earned in the meantime, and, if discharged abroad, has also awarded to the seaman the expense of returning to his port of discharge. So, too, in the case of foreign seamen improperly discharged in this country, the Court has always been in the habit of awarding to them the expenses of their return to their own country."

In the case of the *Elizabeth* (*ubi suprâ*) the voyage agreed for was from Portsmouth to St. Petersburgh and back. The *Elizabeth*, on the 27th September 1818, without the default of any person, and owing to the extreme darkness of the weather, ran on shore on the island of Gothland. The crew got her off, and carried her into the port of Ostergarn for repairs. The master, on the 21st October, discharged the crew, as he told them, "because the ship could not be repaired in time before she would be blocked up by the ice, and therefore it was necessary, in order to save the

expense of maintaining them the whole winter there." They were conveyed to the ports of Wisby and Elsinore, and thence embarked for London, where they arrived in January 1819. The ship *Elizabeth* was in April following brought to England by a Swedish crew, picked up at Gothland. The original crew claimed wages up to the arrival of the ship in April, and their passage-money to England. The owners tendered wages up to the discharge of the crew in September only, and objected to pay any passage-money. Lord Stowell thought that the crew claimed too much, and that the owners offered too little. After referring to cases of wrongful discharge, or, as the French express it, *sans cause valable*, upon idle or false pretences, in which there was, he said, "tyranny, passion, and injustice on the part of the master that warranted a penal retribution against him or his owners," and that hence arose the rule, founded on the civil law, and prevalent in most countries, that the mariner wrongfully discharged has a right to charge up to the time of the return of the vessel to her original port, Lord Stowell said: "But here is a case arising from mere misfortune, and approaching to almost a necessity. The rule to be applied must not be founded upon any idea of penal retribution, but upon just ideas of a fair protection to be given to the seaman, under the casual and common misfortune that has occurred. See what his real damage and loss has been; compensate that, and then real justice and all honest policy is satisfied." In reply to the question what was their just claim, his Lordship replied by deciding that they were entitled to have their passage paid, and their wages up to the time of their arrival in England in January. He said: "I think the master had a right to discharge them under such circumstances of extreme pressure. They did right by acting upon this discharge; and if they are paid their passage and their wages up to the time of their return, they have all they can demand against their innocent owners. In this I go quite as far as the partiality of the law for this class of men will carry me; to go further would be to gratify an unwarrantable pretension. This is the rule which I am disposed to extract, from considerations of pri-

1869. *In re* "THE PERSIA."

vate equity and public policy, in a case not provided for by any existing regulation, either in the ordinances or decisions of this country, or in the books of authority given to the world by ancient jurists. Nothing can be more generally or more peremptorily laid down than that a master, discharging a seaman wrongfully, is answerable for the whole wages of the voyage of that ship; but can such a rule apply either in its terms or meaning to a case where, in consequence of an uncontrollable misfortune, for which no person was at all to blame, but which affects all parties, on a grave and imperious necessity arising thereon, a crew is discharged in order to exonerate the owners from a most oppressive burthen; care being at the same time taken that the seamen shall be protected from all injurious loss? Is it to be laid down that in no such case the master possesses no such responsible discretion, and that he is bound to let that crew derive a most unjust profit from the misfortune of their employers? I conceive not. He is not certainly, in their discharge, to act hastily or with precipitate fear. He is not to discharge but where the circumstances will make it *cause valable*, a real and sufficient ground for such a procedure; still less is he to turn them adrift pennyless, and without resource, in a foreign country."

The present case is a stronger case than that of the *Elizabeth*. The inability of that vessel to proceed upon her voyage was, as Lord Stowell phrases it, caused by "uncontrollable misfortune," not as in the case of the *Persia* by the persistent refusal and default of the owner to provide the funds necessary for the repairs of the ship and the sustentation and wages of her crew. Under the circumstances of this case the master was, I think, notwithstanding the limit in the Articles of the term of service to twelve months, right in remaining in Bombay in charge of the *Persia* until the default of the owner occasioned her sale. The voyage not having been completed, the agent not apparently having instructions to take charge of the vessel, and refusing to advance further moneys for her repair, or for the support of the crew; and it being quite possible that a remittance from

the owner, sufficient for those purposes, might have arrived at the eleventh hour. The sale having been made on the 8th November, the master with all due despatch presented his plaint on the 15th November, and it was filed on the 16th November. He was necessarily detained here to await the hearing of his suit. Messrs. Williams and Bruce in note (*a*) at page 165 of their treatise mention some cases apposite in the present circumstances, which I have not elsewhere met with, as follows:—

"In The *San Jose Primeiro*, the Registrar and merchants (to whom the matter stood referred by the Court of Admiralty according to its usual practice) in their report (29th June 1860) allowed Portuguese seamen their passage-money home.

"In the *Ermina* (8th August 1860) a *colonial* ship, where the voyage was from Halifax to Falmouth and back again to Halifax, they allowed the master, on the ship being sold in this country (England), wages up to his discharge, and for a period sufficient to enable him to get back to Halifax, his passage-money and ten days double pay. In *The Onni* (8th December 1860), *The Omyum*, *The Gustf* (21st July 1862), *The D. Jex.* (2549), *The Ernst Merck* (13th December 1865), similar allowances were made."

The Court of Admiralty has, notwithstanding the words "wages earned by him on board the ship" contained in the Admiralty Court Act, 1861, Sec. 10, referred to by the learned authors above quoted, regarded itself as having jurisdiction in the case of a wrongful discharge to give compensation in the nature of damages to a master: *The Camilla* (*c*); or to Seaman: *The Great Eastern* (*d*).

The same principle appears to me to apply to the case of a voyage prematurely terminated by the obstinate default of the owner, and was, it would seem, applied in the *Ermina*, a case apparently of necessity, the colonial ship in that instance having been sold in England.

The plaintiff cannot reach his destination, Singapore, so soon as the 30th of December, the period up to which he

(*c*) Swabey, 312. (*d*) L. R. 1 Adm. 384.

1869.

In re "THE PERSIA."

asks for his wages. Looking at the circumstances of this case, and at the authorities to which I have referred, his demand is in my opinion reasonable, and within the scope of those authorities. I therefore pronounce in favour of the whole of his claim, viz., Rs. 2,857-0-8, balance of wages up to the 30th December instant, and Rs. 450 passage-money to Singapore, and costs, with speedy execution.

The Sheriff is to pay into the hands of the Admiralty Registrar the moneys in his hands in this cause.*

Attorneys for the plaintiff—*Manisty* and *Hurrell.*

---

* It was held also that the Sheriff was not entitled to poundage on the moneys brought into Court, or on any part of them.

CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION.

OF THE

HIGH COURT OF BOMBAY.

Special Appeal No. 366 *of* 1868.

1869.
Jan. 13.

BA'I MANCHHA' .....*Appellant.*

NAROTAMDA'S KA'SHIDA'S *et al.* .....*Respondents.*

Hindú Law—Joint family—Self-acquired property—Onus probandi—*Gains by science, when impartible.*

In the case of an undivided Hindú family the burden of showing that property in the hands of one of the members of the family is self-acquired and impartible lies upon the person who alleges it to be so.

Gains of science acquired at the family expense, and whilst the acquirer is receiving a family maintenance, are liable to partition, and upon the death of the acquirer form part of the family property, and do not pass to his widow.

THIS was a Special Appeal from the decision of C. G. Kemball, District Judge of Súrat, in Appeal suit No. 19 of 1868 reversing the decree of Bholánáth Sárábhái, the Principal Ṣadr Amín of Súrat, and remanding the case for retrial.

Gordanbhái Shivdás carried on business at Súrat and died about thirty-seven years ago. He left three sons—Káshidas, Dulabhái, and Jamnádás. The business of the firm of Gordanbhái was continued, being carried on by one of the brothers for the benefit of the whole family; but a separate account was opened in the books for each of the brothers who from time to time drew out money for their own purposes. The brothers lived together in the family house.

In addition to the business of the firm of Gordanbhái, each of the brothers carried on a distinct business of his own, of which they each kept private accounts.

Jamnádás, about 20 years before his death, went to Bombay to pass the *vakíl's* examination, and was admitted as a

1869.
BA'I MANCHHA' v. NAROTAMDA'S KA'SHIDA'S. et al.

pleader, and on his return to Súrat he practised as a pleader and with success. The accounts of his earnings were kept in a private book distinct from that of the family firm. He also lent money on promissory notes and bonds which he took in his own name, upon some of which he sued and obtained decrees in his own name. He also purchased some immoveable property which was conveyed to himself, but it was not proved whence the money lent, and that with which the immoveable property had been purchased, was acquired.

Of the three brothers, Káshidás died in 1860, leaving male issue; Dulabhái died in 1867, also leaving male issue; and Jamnádás died in 1866, leaving no male issue, but leaving a widow surviving him.

This suit was instituted by the heirs of Káshidás and Dulabhái against the widow of Jamnádás to recover from her certain ornaments and other moveable property (of the value of Rs. 53,537-13-8), and to establish their proprietary right over certain immoveable property, all belonging as they alleged to the firm of Gordanbhái Shivdás.

Bái Manchhá's defence was that the property in dispute did not belong to the firm of Gordanbhái, nor had her deceased husband purchased it with the money belonging to the firm; that her husband and his brothers traded in their own names respectively, and acquired property separately, and had therefore no claim to each other's property; that her husband practised as a pleader, and also used to lend money at interest, and acquired the property out of his own private earnings so that it belonged to her after his decease; and that the ornaments formed her *stridhan* to which the plaintiffs had no right whatever.

The Principal Sadr Amín rejected the claim of the plaintiffs.

The following is the judgment of the District Judge.

"It appears that one Gordanbhái, the ancestor of the parties, died in Samvat 1888 (A.D. 1832) leaving three sons Káshidás, Dulabhái and Jamnádás. All three of these brothers are dead, Káshidás dying in 1916 (A.D. 1860), Dula-

bhái in 1923 (A.D. 1867), and Jamnádás in 1922 (A.D. 1866); and this action is brought by the sons of Kashidás and Dulabhái against the widow of Jamnádás, to recover from her certain moveable property and to establish their proprietary right over some immoveable property. Putting aside the matter of *stridhan* for the present, the dispute resolves itself into two questions :—First, whether the family was joint; and, secondly, if so, whether the property claimed was not partible by reason of its having been acquired by Manchhá's husband independently of his co-heirs. And here I must express my surprise at the singular finding of the lower Court to the effect that it was not proved that the family was unseparate, if I may use such a word. The whole evidence goes to show as clearly as possible that the family was, up to the time of Jamnádás's death, joint in the common acceptation of the term, and the defendant, without attempting to traverse the point, based her right to the property in dispute on the ground that it was self-acquired by her husband, and, therefore, not liable to the claims of his co-heirs, he having been by profession a *vakil*, and also, having been engaged in money lending quite independent of his family. But, assuming that the lower Court was right in framing an issue on the subject of the family being joint or separate, I am of opinion that the Court was bound to presume, on the answer put in by the defendant, that the family was joint until the contrary was proved; so that the Court's finding that it was not proved that the family was *avibhakta*, shows that it did not rightly understand on whom the *onus probandi* rested.

"I now come to the real gist of the dispute, namely, whether the property in question was liable to partition amongst the co-heirs of Jamnádás or was inherited by Manchhá as heir to her husband; and this involves two questions: first, whether the property was self-acquired, and, if so, secondly, whether self-acquired property of an undivided Hindú on his death without male issue devolves on his surviving coparceners or on his widow. With respect to the first question, I think that, admitting the existence of a joint family property, about which there is really no dispute, the

1869.

BA'I MANCHHA' v. NAROTAMDA'S KA'SHIDA'S. *et al.*

onus of proving the self-acquisition pleaded rests on the defendant, the presumption in such a case being that all the acquired property belongs to the family. The argument resorted to by the respondent before me is that, though the family was joint as to the ancestral estate, still each brother traded separately on his own private account; but the question is, has it been proved by Manchhá, who alleges her husband's separate rights, that the property was entirely acquired from separate resources without aid from the ancestral estate. I hold that it has not. She says her husband was a money-lender and a *vakíl*, the profits derived from the profession being, it is presumed, classed under the head of 'gains of science,' but she has not thought it worth her while to show how her husband started in business as a money-lender, and whence he derived means of subsistence while he was acquiring the knowledge requisite for a competent pleader; and, in the absence of such information, the evidence that the brothers all lived together (Manchhabái still lives in the common house), and took out money from the common stock as they required it, affords, I think, ample presumption that the means by which the gains were acquired by the different members of the family were derived from the common ancestral property, and that the acquisitions were for the general good of the family. The Principal Sadr Amín appeared to consider that the burden was on the plaintiffs of showing that Jamnádás was not sole owner of the decrees passed in his own name, and that the fact of Jamnádás having taken money from time to time out of the firm did not affect the separate character of the earnings which he derived from those means, but the fact of Jamnádás carrying on business in his own name raised no presumption of separate acquisition (*vide* "Calcutta High Court Reports," Vol. I. p. 37 and p. 308); and I cannot agree with the lower Court in thinking that the fact of Jamnádás having derived assistance from the joint funds did not affect his exclusive right to the gains accruing thereon. I feel it unnecessary to go into the intricate question of 'gains of science' which was ably argued before me by Mr. Nanábhái. I am of opinion that the defendant has failed to show

that any portion of the property which she claims as heir to her husband was acquired by him from separate resources. I then come to consider the question of *stridhan*, as this comes to be a material point in the case; and I find that the lower Court has passed it over with but slight notice. I determine on returning the case to the Principal Ṣadr Amín to take such evidence as may be offered as to what property is really the *stridhan* of Manchhá, and to pass his finding thereon. *The decree is reversed, and the case returned under sec.* 356 *of the Code of Civil Procedure. Costs to be apportioned hereafter.*"

The appeal was argued on the 25th of November 1868, before COUCH, C. J., and NEWTON, J.

White (with him *Shántárám Náráyaṇ*) for the appellant—Though the general rule is, that he who alleges self-acquisition must prove it, yet the circumstances of this case are such as to shift the *onus probandi* to the plaintiffs. Jamnádás had the means of acquiring property, and what he possessed he always treated, and dealt with, as his own. This was acquiesced in by the other members of the family. He cited *Dhunookdháree Láll* v. *Gunput Láll* (*a*) *Shek Golám Sing; Bissro Pershad Mytee* v. *Káne Dayee.*

(*c*) *Chalakondra Chálákonda* (*d*); Strange H. L. Vol. I p. 214, Vol. II. pp. 372, 373; Grady on "Hindú Law" p. 405; Steel on "Castes," p. 212.

Pigot (with him *Nanábhái Haridás*) for the respondents, commented on the evidence and cases cited for the appellant, and referred to *Gáne Bhine* v. *Káne Bhive* (*e*); Mitac. on "Inheritance," ch. I. sec. 4, para. 8.

Cur. adv. vult.

Jan. 19, 1869. COUCH, C. J.:—In this case the Judge has properly laid down the points for consideration, and held that the family was joint until the contrary was proved. The law as regards the *onus probandi* in such cases was considered by H. M.'s Privy Council so far back as 1831 in the case of *Lucimon Row Sadasew* v. *Mullar Row Bajee* (*f*), where their Lordships observed—"it appears, from the

(*a*) 10 Calc. W. Rep. Civ. R. 122. (*b*) Ibid. 198.
(*c*) 5 Calc. W. Rep. Civ. R. 82. (*d*) 2 Mad. H. C. Rep. 56.
(*e*) 4 Bom. H. C. Rep. A. C. J. 169. (*f*) 2 Knap. P. C. C. 60.

1869.

BA'I MANCHHA' v. NAROTAMDA'S KA'SHIDA'S. et al.

cases that have been cited in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof of them lies upon the party who would seek to bring himself within them"—and this view of the law was acted upon by their Lordships so late as 1865 in the case of *Pránkishen* v. *Mothoorámohun*, (*g*), where it was ruled that the presumption of Hindú law was that property, not shown to be separate, is joint, and the *onus probandi* lay on the party claiming it as separately acquired. If there are any *dicta* in the Calcutta cases opposed to this, we can only say that we differ from them and follow the higher authority. We, therefore, hold that the ruling of the Judge in regard to the *onus probandi* is correct, and the same has been decided in various cases in this Court.

The question as to what gains should be considered self-acquired property has been very fully considered by the Madras High Court (*h*), and the result is that "gains of science, imparted at the family expense and acquired while receiving a family maintenance are not impartible property." (*i*)

In this case the learned Judge (HOLLOWAY J.) observed "we are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science, which have been taught at the expense of the family funds, are not impartible. To render them so, the science or learning must have been imparted by persons not members of the learner's family" (*j*). We concur in this judgment, and we cannot give any weight to what is said upon it in a recently published Text Book (*k*). We have to ascertain what the law is, and not what it ought to be: and having ascertained it, we must apply it. Nor, having regard to the usage, of native society, do we think it is bad law. There may be hard cases, and the remedy for such is in the hands of the parties themselves—viz., to divide. We must confirm the decree of the Judge with costs.

NEWTON, J.—Concurred.

Decree confirmed.

(*g*) 10 Moo. Ind. App. 403. (*h*) 2 Mad. H. C. Rep. 56.
(*i*) Ibid. 76. (*j*) Ibid 77. (*k*) Grady on Hindú law p. 405.

Referred Case.

1869.
Jan. 19.

RASA'JI bin DAVLA'JI.....*Plaintiff.*
SAYA'NA' bin SAGDU *et al.* .....*Defendants.*

Penalty—Promissory note payable by instalments—Increased rate of interest.

Where a promissory note payable by instalments stipulated for interest at two per cent. per mensem, and, in default of punctual payment, that interest should be charged at one anna per rupee per mensem from the date of the note, it was held that this increased rate of interest was a penalty which might be relieved from on payment of the lower rate.

CASE referred for the decision of the High Court by Janárdan Vásudevjee, Judge of the Court of Small Causes at Puṇá.

"In this suit the plaintiff sues the defendant for the payment of Rs. 125-12-0 on a promissory note for Rs. 199, which, after stipulating for repayment by monthly instalments, of ten rupees with interest at two per cent. per mensem, provides that, in default of punctual payment, interest shall be charged at one anna per rupee per mensem from the date of the note.

"The defendants plead (1) that the plaintiff waived the agreement for payment by monthly instalments, and that, therefore, he is not entitled to demand the increased rate of interest; (2) that the agreement to pay the increased rate of interest is a penalty and ought not to be enforced.

"The first plea is not proved. As to the second, it raises an important question of law. Act XXVIII. of 1855 abolishes all usury laws, and any rate of interest for which parties may stipulate is now legal. The agreement to pay an increased rate of interest on default in payment may, therefore, be enforced at law; but Equity will not recognize it. The object of the agreement is to secure payment at the stipulated time, but the Court of Chancery does not regard time as of the essence of the contract. There an agreement designed merely to secure the performance of the principal obligation is looked upon as a penalty, which Equity will

1869.

RAKA'JI DAYLA'JI v. SAYA'NA' SAGDU et al.

interfere to relieve against (Story on Equity Jurisprudence Vol. II. secs. 1314 and 1316); and in *Seton* v. *Slade* (*a*) the Court of Chancery has held that a stipulation to pay interest at five per cent. on a mortgage with interest at four per cent., if the four per cent. be not regularly paid, is a penalty, and that the party may be relieved from it, on the terms of paying the four per cent. with interest thereon from the time when the same ought to have been paid, as if it had been received. (White and Tudor's Leading Cases in Equity, Vol. II., pp. 475 and 476, 3rd ed.) It is on this doctrine that that Court decrees the redemption of a mortgage, which, in default of payment at the stipulated time, would be foreclosed at law, and our Courts, which are Courts of Equity as well as of law, have in later years adopted that doctrine, and have awarded the re-conveyance of mortgaged property on payment of the mortgage debt with interest. I am, therefore, of opinion that the same doctrine should be made applicable to cases of the class now submitted, and that the defendants may be relieved from paying the increased rate of interest."

PER CURIAM (COUCH, C. J., and NEWTON, J.)—The Court is of opinion that the increased rate of interest is a penalty, and may be relieved from on payment by the defendant of the lower rate.

Jan. 19.

Referred Case.

MOTOJI bin RATNA'JI .....*Plaintiff.*

SHEKH HUSEN .....*Defendant.*

Interest—Promissory Note—Penalty.

Where a promissory note payable by instalments stipulated that, in default of payment of any one instalment, interest should run at one anna per rupee per mensem, this rate of interest was relieved from on payment of interest being made at 9 per cent. per annum from the time when each instalment became payable until the time of payment.

CASE referred for the decision of the High Court by Janárdhan Vásudevji, Judge of the Court of Small Causes at Puná.

"The only difference between the two cases, (this and the one immediately preceding) is, that in the case already re-

(*a*) 7 *Ves.* 265.

ferred, the promissory note stipulates for an increased rate of interest on default of payment, while in that now under notice, the promissory note, after stipulating for payment by monthly instalments without interest, provides for interest at one anna per Rupee per mensem, in default of payment of any one instalment.. The plaintiff in this latter suit, it is to be observed, admits in his evidence, that the amount for which the note has been taken, includes interest added on in advance for the period to which the instalments extend.

"The object of the two agreements being the same; viz., to secure payment at the stipulated time, the agreement in the one case partakes as much of the character of a penalty, as the agreement in the other; I am, therefore, of opinion that the agreement in the present case also should be relieved against.

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The Court is of opinion that the increased rate of interest is a penalty, and may be relieved from on payment of interest, at the rate of 9 per cent., from the time when each instalment became due to the time of payment.

Special Appeal No. 536 *of* 1868. Jan. 20.

DA'DA' valad VALLI .....*Appellant.*
BA'VA'SHA' valad KA'SAM .....*Respondent.*

Mortgage—Redemption—Denial of mortgage by mortgagee—Vakil's omission to argue point.

Where a mortgagor brings a suit to redeem mortgaged land on payment of such sum as shall be found due to the mortgagee, the Court is not justified in decreeing possession *without payment* in favour of the mortgagor, merely because the mortgagee denies the existence of the mortgage.

Where a point is taken on appeal the Appellate Court should consider and decide it, although the *vakil* may omit to argue it.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Assistant Judge of Sattára, in Appeal suit No. 123 of 1868, confirming the decree of the Munsif of Máini.

1869.

DA'DU VALLI v. BA'VA'SHA' KA'SAM.

Bávásha valad Kásam sued to redeem, on payment of the amount which might be found due, certain land alleged to have been mortgaged to the defendant, in the Fasli year 1258 (A.D. 1848-19), and given into his possession.

The defendant denied the mortgage, and stated that his father had taken up the land from the village authorities, and that he succeeded his father in the *Vahivát*, and that his and the plaintiff's father had been divided for 60 or 70 years.

The Munsif, Bháskar Bhikáji, found that, when the fathers of the parties were united in interest, they got the land from an *inámdár*; that, in the Fasli year 1237 (A. D. 1827-28), the land in question fell to the plaintiff's share at a division of the property, and that the plaintiff proved that his mother had mortgaged the land to the defendant for Rs. 80, but the Munsif held that, as the defendant had utterly denied the mortgage, he was not entitled to get the money due upon the mortgage, and, therefore, he awarded possession of the land to the plaintiff without payment of the mortgage money. He relied in support of his ruling on *Shek Abdullá* v. *Shek Muhammad* (*a*).

The following is the judgment of the Acting Assistant Judge:—

"The issues are:—(1) Did the plaintiff mortgage the land to the defendant? (2) If so, has the defendant a right to get his mortgage money?

"On the first issue I find that plaintiff's mother did mortgage the land, as is proved by the defendant's own witness No. 11, the Pátil, as also by witnesses Nos. 30 and 25. What appellant states in the appeal, as to the non-details of the mortgaging, is quite unreasonable and absurd. In cases of mortgages in this country, the practice generally is for the deed to remain with the mortgagee, and, if he, as in this case, declines to produce it or show it to plaintiff, how can the plaintiff know the details, such as date, amount, &c. In this case it could not be so, because the plaintiff was

(*a*) I. Bom. H. C. Rep. 177.

not the actual mortgagor, apparently, but his mother. Plaintiff's plaint is indefinite, it is true, but it is just as definite as is consistent with truth in a case of this kind. A further corroboration of the mortgaging is the proved fact that plaintiff and defendant are relatives, and so they, at one time, and as the Munsíf finds now, had shares in the land. No. 41 proves this in detail, and he is the witness of all others who should know, he being the Pátil. No. 25, the writer of the mortgage, which is not produced, is also the natural writer, he being village Kulkarni.

"Appellant has not said a word on the second point.

"I confirm the Munsíf's decision with costs on appellant."

Pándurang Balibhadra for the respondent. The Appellate Court was justified in the conclusion at which it arrived, by reason of the denial by the mortgagee of the mortgage. The point, however, was abandoned, as appears from the Assistant Judge's observation that "the appellant has not said a word on the second point."

COUCH, C. J.:—In this case the plaintiff by his plaint sought to redeem the land on payment of the money that might be found due on the mortgage, and he by his own witnesses proved the amount of the mortgage. The defendant, however, denied the mortgage, and the Munsíf, although the plaintiff had made out the case put forward by him, awarded to him that which was not asked for by him, viz., possession of the land free from any payment. The decision of the High Court which is quoted does not apply to this case, and without expressing any opinion as to whether we concur in it, it is sufficient for us to remark that there it was for the mortgagee to prove the amount of the mortgage and he fraudulently destroyed the deed. But here we see no ground for holding that, because the defendant denied the case set up by the plaintiff, the latter should get more than he asked for. The second issue raised in appeal was whether the defendant had a right to get his mortgage money, but the Assistant Judge did not go into it

1869.
DA'DA' VALLI v. BA'VA'SHI' KA'SAM.

on the ground that the appellant's *vakíl* had not said a word on it; but remembering the mode in which cases are conducted in the Mofussil, we are of opinion that, if a point really arises and is taken, we should not be justified in holding that it was abandoned, because the *vakíl* did not argue it. The decree in this case should have been for redemption of the land on payment of the mortgage money, which is found to be Rs. 80; and we therefore amend the Assistant Judge's decree accordingly. The party seeking redemption must generally pay the costs of the suit; but here the plaintiff offered payment of the amount which might be found due, and the defendant denied the mortgage in toto. He should, therefore, be made liable for the costs in the lower Courts. The defendant had to come to this Court to get the error of the lower Court corrected, and, therefore, he should have the costs of this Special Appeal.

NEWTON, J., concurred.

Decree amended.

Jan. 26.

Special Appeal 419 *of* 1868.

RA'MCHANDRA RAGHUNA'TH .....*Appellant.*
ABA'JI bin RA'STYA' .....*Respondent.*

Jurisdiction—Small Cause Court—Arrears of rent, suit for—Special Appeal—Act XI. of 1865, *sec.* 6—*Act XXIII. of* 1861, *sec.* 27.

In suits for arrears of rents of land, when the claim is under Rs. 500, a Special Appeal lies to the High Court, such claims not being generally cognizable by Courts of Small Causes.

For the purpose of recovering rent from a tenant the *mrugshí* year ends on the 31st of July.

THIS was a Special Appeal from the decision of A. Bosanquet, Acting Judge at Thánáá, in Appeal suit No. 296 of 1867, reversing the decree of the Munsíf of Panwell.

The plaintiff, Rámchandra, sued the defendant, Abáji, to recover rent of a portion of a *khár*, alleging that he had leased it to the defendant under an agreement that the latter should pay him six *mans* of rice per *bighá* in the

shape of rent for each year, but that he failed to pay him at the above rate the amount of rice. The plaintiff also claimed interest on the amount of the rent.

The defendant denied the lease, and contended that the claim was barred by the law of limitation; that the *khár* originally belonged to Máhádáji Malhár, who had agreed to receive the Government assessment and a *maṇ* of rice per *bighá* from the defendant; that, after the survey, Government undertook to repair the *khár*, and the defendant accordingly continued to pay rent and the usual *maṇ* of rice per *bighá* to Government; that the plaintiff did not look after the *khár* and that he was not therefore entitled to the *Shilotr Maṇ*.

The Munsíf awarded the claim, on the ground that it was not barred, and that the plaintiff was entitled to six *maṇs* of rice per *bighá*. In appeal, the Acting Judge reversed the Munsíf's decree, delivering the following judgment:—

"The issues for decision are:—1, Is this claim barred by the law of limitation? 2—if not, is the plaintiff entitled to the rent demanded by him? 3—if so, is interest due to him?

"I find the 1st and 2nd issues for the defendant.

"A finding on the 3rd issue is, therefore, not necessary.

"Clause 8 of sec. I. of Act XIV. of 1859 is applicable to claims for rents of land. This suit was instituted on the 30th July 1866; but the year for which rent was demanded expired on the 5th June 1863 at latest, the time when, if let to another tenant, it would have been made over to him. The defendant had paid for the land Rs. 2, annas 12, and a *maṇ* of rice for the years previous to 1862 and 1863, and if the plaintiff wanted more rent he should have given the defendant notice accordingly. I reverse the Munsíf's decree with costs."

The appeal was called on for agument on the 7th October 1868 before COUCH, C.J., and GIBBS, J.

Shantárám Nárayaṇ for the respondent. No special appeal lies in this case. Sec. 27 of Act XXIII. of 1861 enacts that no special appeal shall lie from any decision passed in suits cognizable in Courts of Small Causes under

1869.

RA'MCHANDRA RAGHUNA'TH v. ABA'JI RA'STYA'.

Act XLII. of 1860, where the debt does not exceed 500 rupees. Under that Act, it is true, suits for rent could not be brought in a Small Cause Court, but it is now repealed by Act. XI. of 1865 (to which all references to Act XLII. of 1860 are now to be considered to be made), sec. 6 cl. 4 of which enables Small Cause Courts to take cognizance of suits for arrears of rent, when the Judge of such Court shall have been specially invested by the Local Government with jurisdiction over such claims. Thus, suits for arrears of rent are now cognizable by *Courts* of Small Causes, though the judges of such Courts may not always be invested with power to try them. It cannot now be said that suits for arrears of rent of land are not suits of the nature cognizable in Small Cause Courts.

Vishvanáth Náráyan Mándlik—The jurisdiction of this Court cannot be taken away without express words, which sec 6. of the Act certainly does not contain. After stating the suits that are cognizable in Small Cause Courts the section proceeds, "provided that no action shall lie in any such Court * * * for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless, as regards arrears of *rent*, for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears." This, in fact, allows the local Government to invest a Small Cause Court Judge personally with the then jurisdiction of a Revenue Officer over claims to arrears of rent, just in the same way as he may be invested with the powers of a Principal Sadr Amín under sec. 51 of the same Act. Under (Bombay) Act II. of 1866 the Civil Courts are now invested with jurisdiction over claims to rent, but that Act does not extend the jurisdiction of the Small Cause Courts. What should be considered under sec. 27 of Act XXIII. of 1861 is the normal nature of suits cognizable in these Courts, not the extraordinary jurisdiction that may be conferred upon the Judges of them.

Cur. adv. vult.

1869.
RA'MCHANDRA RAGHUNA'TH v. ABA'JI RA'STYA'.

On the 26th January 1869, the Court decided that they would hear the appeal, which was then argued.

Vishvanáth for the Appellant:—The present suit was filed on the 30th of July 1866 for rent, for the year 1862-63, which was payable on the 31st of July 1863, and not on the 5th of June 1863 as the Judge holds. The Munsíf gave us a decree, because, by the decree Exhibit, No. 37, we had recovered rent for a previous year. The Judge held that the suit was barred because the year expired on the 5th of June 1863, but for Mrugsál year the 31st of July is held to be the date on which rent becomes due, *vide* Special Appeal No. 319 of 1868, decided on the 9th of September 1868, and Revenue Circulars p. 170 No. 3. As to the rate of the rent we are not bound by the acts of the Collector.

As we did not agree with our tenants in regard to the rate of the rent, the Collector interfered and fixed the rate. We however declined to receive the rent at that rate and therefore the Collector attached the *khár*. We then sued the Collector, and in the meantime the tenants paid rent to the Collector. In the suit against the Collector we succeeded in getting from him the balance of rent according to our rate, and our suit was a sufficient notice to the tenants for paying the rent at the higher rate as ruled in Special Appeal No. 78 of 1865. In the absence of any special agreement the rent should be paid at the rate prevailing in the country, that is, the rent should be fixed according to the custom of the country; but here we had a decree (Exhibit No. 37) against the defendants, and the rate fixed in it is conclusive.

Couch, C.J.—It was objected that a special appeal did not lie in this case, but we held otherwise. Sec. 27 of Act XXIII. of 1861 provides that no special appeal shall lie from any decision in any suit of the nature cognizable in Courts of Small Causes under Act XLII. of 1860. Now the latter Act is repealed, and the Act in force is Act XI. of 1865, sec. 50 of which provides that references to Act XLII. of 1860 shall be considered as references to Act XI. of 1865. We must therefore see what are the terms of that Act (XI. of 1865)

1869.
RA'MCHANDRA RAGHU'NA'TH v. ABA'JI RA'STYA'.

with regard to such a suit. The provision is to be found in its sixth section, which provides that no action shall lie in any such Court for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, *unless*, as regards arrears of rent, for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears. The application of this, to a case like the present one, depends upon the effect to be given to the word *"unless,"* since the case would not be cognizable otherwise. The effect is that a Judge may be vested with the power, but that does not make the suit cognizable generally by virtue of the Act. It is difficult to construe the two provisions together and put a meaning upon them. Suits of the nature cognizable by Courts of Small Causes must mean, without reference to clause 4 of section 6 of Act XI. of 1865, and must be cognizable in general.

Now, as regards the merits of the case, the District Judge laid down three issues. He decided the first and second issues, but came to no conclusion on the third issue as to whether any interest was due to the plaintiff. As to the first issue of limitation, he held that the 5th of July 1863 was the date on which the rent was due, but, according to the decision of this Court quoted, the year does not expire until 31st of July, and, therefore, proceedings for the recovery of the rent could not have been taken against the tenants before that date. Hence the Judge erred in law in holding that the year had expired on the 5th of July. As to the second issue, as to whether the plaintiff was entitled to the rent claimed, the Judge found for the defendant on the ground that the defendant had paid for the land at the rate of Rs. 2-12-0 and a *man* of rice for the years previous to 1862-63, and that the plaintiff had not given notice to the defendant of the increased rent. But it appears that there was a decree between the parties which fixed the higher rate of rent. Previous to the year 1862-63 the Collector had attached the *khár*, and was in possession of it, and the

1869.
RA'MCHANDRA RAGHUNA'TH v. ABA'JI RA'SIYA'.

rent was paid to him and not to the plaintiff. It was, therefore, an error to rely on such payments for fixing the rate of rent, which, under the circumstances of the case, should be the same as was awarded by the decree No. 37. Had there been no decree, the proper decision would have been to award the rent according to what had been paid by the defendant before the Collector attached the land, or, if none appeared to have been paid, according to the custom of the country (a). The only issue remaining undisposed of is in regard to the interest claimed. The Judge has not recorded his finding on it, and, if his finding is desirable, the case must be remanded to him, but the Respondent's *vakíl* has intimated that, taking into consideration the expenses and delay attendant on a remand, he will not press his claim for interest, and we are not aware of any law authorizing the award of interest in the manner claimed. We therefore reverse the decree of the District Judge, and amend the decree of the Munsíf by deducting the amount awarded by him on account of interest. All costs on the respondent.

GIBBS, J.—Concurred.

Munsíf's decree amended.

(a) This was the ruling in Special Appeal No. 420 of 1868, between this plaintiff and another tenant disposed of by the same Bench on 26th January 1869.

Special Appeal No. 480 *of* 1868. Jan. 28.

MURA'R DA'YA *et al* .....*Appellants.*
NA'GRIA' GANESHIA' .....*Respondent.*

Fees upon Marriage—Caste Question—Reg. II. of 1827 *sec.* 21.

The Plaintiffs sued to recover from the defendant certain fees alleged to be due to them, as *Mehtars* of the caste, on the marriage of the daughter of the defendant.

The defendant denied that the plaintiffs were his *Mehtars*.

Held, that the question between the parties was a caste question with which the Courts were precluded from interfereing by Reg. II. of 1827 sec 21.

THIS was a Special Appeal from the decision of A. L. Spens, Senior Assistant Judge at Khedá, in Appeal suit

1869.
MURA'R DA'YA et al. v. NA'GRIA' GANESHIA'.

No. 199 of 1866, reversing the decree of the Munsíf of Mahúdhá.

The plaintiffs sued to recover from the defendant the sum of Rs. 1-8 alleging that they (the plaintiffs) were the *mehtariá ageván pátils* of Dheds residing in Mahúdhá and in 28 other villages of the Mahúdhá Táluká, and as such had a right to receive Rs. 1-8-0 from the father of each girl that was married; that, from the time of their ancestors up to the present day, they and their ancestors enjoyed this right, but that the defendant refused to pay the sum of Rs. 1-8-0 on account of the marriage of his daughter. The plaintiffs also claimed to recover as damages Rs. 14-7-0.

The defendant answered that the plaintiffs were not his Mehtars, and that he never engaged them as such, and that, therefore, their claim would not lie against him.

The Munsíf awarded the claim, but the Senior Assistant Judge reversed his decree. The following is his judgment:—

"Is the cause of action triable by the Court?

"On this issue I decide for the appellants.

"This is a purely caste question and one dependant upon the will and pleasure of its members. This question has been decided more than once as to other supposed caste *haks*, see *Bapoo valad Mahomet* v. *Oomurkhan Daoodkhan*, S. A. No. 2444 (*a*), and *Kazee Shaik Mohinoodeen* v. *Usmaljee Momuljee*, S. A. No. 3574 (*b*); and in direct reference to this suit, see the decision passed by the Judges of the High Court at Calcutta. *Nobin Chunder Dutt* v. *Mudhub Chunder* (*c*). I reverse the Munsíf's decree. All costs on Respondent.

The case was heard on the 14th December 1868, before NEWTON and TUCKER, J.J.

Nánábhái Haridás for the Appellants. The question is whether the right is a civil right, and, as such, can be enforced in a Civil Court. Section 21 of Reg. II. of 1827 prohibits interference with caste questions, but this is not a question

(*a*) Morris' Selected Decisions, Part II. 142.
(*b*) 4 Morris Rep. 48. (*c*) 5 Cal. W. Rep. Civ. R. 225.

of caste. He cited, *Bhiva Sawunt* v. *Vittá Rám Poojára*, S. A. No. 3675 (*d*); *Tirth Bhut* v. *Shesapá Sonar* (*e*); and *Nobin Chunder Dutt* v. *Madhub Chunder* (*f*.)

Dhirajlál Mathurádás for the Respondent. The suit is to recover damages, but there is no injury to caste or character as required by section 21 of Reg. II. of 1827. Had the plaintiffs claimed to recover the tax from all the villagers they would have perhaps a Civil right founded on usage, but here they claim the tax from the caste-men by reason of their (plaintiffs) being, they say, the head men of the caste. The question whether they are the head men is a caste question. He cited S. A. No. 3574; S. A. No. 2144; S. A. No. 246 of 1867; and S. A. No. 131 of 1868.

Cur. adv. vult.

PER CURIAM :—We are of opinion that the Lower Appellate Court has correctly determined that the question at issue between the parties to this suit is a caste question, and, consequently, one excluded from the cognizance of the Civil Courts by Reg. II. of 1827, sec. 21. The plaintiffs and defendant belong to the Dhed community, and the plaintiffs have sued the defendant to recover from him certain fees which they claim as due to them as Mehtars or chief men of the Dhed caste on the occasion of any marriage ceremony which takes place in the family of any member of that caste. The defendant refuses to recognize the plaintiffs as the chief men (Mehtars) of his caste, and denies that he is under any obligation to pay them fees. We concur in the view expressed by a Division Bench of this Court in Special Appeal No. 39 of 1862, *Ambu valad Appáji* v. *Khanu Sakhárám** decided on 23rd

(*d*) 4 Morris Rep. 118. (*e*) 7 Harrington 236.
(*f*) 5 Cal. W. Rep. Civ. R. 225.

* *Note.*—This was a suit to establish the right of the plaintiff to certain *mánpáns*. The Munsif rejected the claim, and the Acting Assistant Judge confirmed the decree on the ground that the offering of *mánpán* was a religious act and that the claim to it was not enforceable.

The plaintiff appealed, specially relying upon the decision in *Gorindrow bin Anundrow* v. *Dewjee bin Esjee* (S. A. 3069) †, and *Balwunt Baboorow* v. *Babno Narojee* (S. A. 3212)(‡), and *Bhiva Sawunt* v. *Vitta Ram* (S. A 3675) (*).

(†) 1 Morris Rep. 160. (‡) 3 Ibid 283. (*) 4 Ibid 118.

1869.
MURA'R JA'YA *et al.* v. NA'GRIA GANESHIA'.

December 1864, in a similar dispute.* We, therefore, affirm the decree of the Senior Assistant Judge and direct that the special appellant pay the costs of this special appeal.

Decree confirmed.

Jan. 29.

Special Appeal No. 470 *of* 1868.

SHIVRA'M VITHAL .....*Appellant.*
BHA'GIRTHIBA'I .....*Respondent.*

Suing without written authority—Jurisdiction—Ratification—Civ. Proc. Code, sec. 19.

A widow, without any written authority, sued on behalf of her son, who was absent on military service beyond the jurisdiction of the Court. The defendant did not object to her want of authority in the Court of first instance, but did so in the Courts of Appeal and Special Appeal.

Held, that the objection was a valid one.

Also that the defect of jurisdiction could not be cured by the production of a written authority in the Court of Special Appeal.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Ratnágiri, in Appeal suit No. 87 of 1868, confirming the decree of Rágho Náráyán, Munsíf of Vingurlá.

* PER CURIAM (FORBES and TUCKER J.J.):—The Court is clearly of opinion that the question at issue between the parties in this Court is a 'caste question' and one which is consequently excepted from the cognizance of the Civil Courts. A man of the weaver caste sues to obtain a declaration of his right to be recognized as the head of the said caste, and to receive from certain other members of the caste, on certain public occasions, the privileges and precedence accorded to the holder of that office, notwithstanding that they have elected another person to that position. The case is clearly distinguished from the special appeal No. 3675 (1 Morris p. 118) and the other suits for *mánpán* which have been cited. In those cases a person, claiming to be the head of a particular village or District, demanded a recognition of his right to precedence, on occasions of ceremony, from all the householders of the said village or district; but the present action is substantially a claim to enforce the recognition, by a particular caste, of the plaintiff as its head, and in determining it the Court would be called upon to interfere with the autonomy of the caste, and might, by the application of the ordinary rules of inheritance, be called upon to compel the caste to accept a chief whom they were unwilling to acknowledge. Section 21 Reg. II. of 1827 appears to the Court to have expressly prohibited the interference of the Court in such matters, and, therefore, though the Court does not concur in the reasoning of the Assistant Judge, it is of opinion that the decree must be confirmed.

1869.
SHIVRA'M VITHAL v. BHA'GIRTHI-BA'I.

The suit was instituted by Bhágirthibái on behalf of her son, who was absent on Military service in a district beyond the jurisdiction of the Court, to recover a piece of land, which, she alleged, had been let by him to the first defendant, but which he, combining with the second and third defendants, refused now to give up. The plaintiff also sought to recover Rs. 37 as mesne profits for two years.

The summons was not served upon the fourth defendant, but his brother, Shivrám Viṭhal, was, at his own request, made a defendant. He alone put in an answer, in which he stated that a part of the land had always been his, and that, though a part of it had been mortgaged to him, it had been redeemed by the plaintiff and he, the defendant, had no claim to it any longer.

The Munsíf of Vingurlá, finding the land sued for to belong to the son of Bhágirthibái, gave a decree in her favour.

The defendant Shivrám appealed on the ground, principally, that Bhágirthibhái could not sue on behalf of her son without a written authority.

The Senior Assistant Judge found that, from the evidence on the record, it appeared that Bhágirthibái was the manager of the property, her son Bápú, the real owner, being away on military service, and that, as no objection was raised in the Court of first instance as to the plaintiff's competency to bring the suit, no evidence bearing special reference to this point had been received. He therefore confirmed the Munsíf's decree.

The special appeal was argued on the 18th January 1869, before NEWTON and WARDEN, J.J.

Shántárám Náráyaṇ for the Special Appellant.—On the face of the plaint it appears that the plaintiff, Bhágirthibái's son, is on military service in a district beyond the jurisdiction of the Court, and that, in accordance with the provisions in sec. 19 of the Code of Civil Procedure, the plaintiff is not provided with a written authority from the son—the owner of the property sued for, countersigned by his commanding

1869.

SHIVRA'M VITHAL v. BHA'GIRTHI-BA'I.

officer. He relied on S. A. 1016 of 1864, decided on the 4th of October 1865 by TUCKER and WARDEN, J.J.

Bahiravnáth Mangesh for the Special Respondent. In a previous suit between the same parties for rent this objection of jurisdiction was not taken, nor was it taken in this case in the Court of first instance. It ought not, therefore, to be now allowed. This defect is one that can be cured by producing the written authority here. The defendant admits a part of the claim which should at all events be allowed.

Cur. adv. vult.

On the 29th of January the judgment of the Court was delivered by—

NEWTON, J.—We have carefully seen the precedents, and are of opinion that the law is clear. Mr. Shántárám has pointed out two cases. In S. A. No. 587 of 1867 (decided on the 29th November 1867, by WARDEN and GIBBS, J.J.) it seems that a woman was suing on behalf of her husband without proper authority, and it was held that she was not entitled to do so. There is another case, S. A. No. 370 of 1867, decided on the 10th December 1867, which is stronger even than this. The Chief Justice and Mr. Justice NEWTON there held that, an adoption having taken place, the adoptive mother could not sue. The present case is stronger still. Here the plaintiff has a grown up son.

The objection to the plaintiff's right to bring the suit, although it was not taken in the Court of first instance, was taken both in Regular and Special Appeal. The Lower Appellate Court has recorded a finding for the plaintiff; but we do not consider that it was justified in doing so. The son was the owner of the property, and not the mother, who had no authority given to her of any kind, and we are of opinion that no authority can be given to her now. We must therefore reverse the decrees of both the Lower Courts and throw out the plaintiff's claim with costs.

This decree will not interfere with the son's right of suit.

Decrees reversed.

Special Appeal No. 534 *of* 1868.

Feb. 1. 1869.

HARI bin JOTI .....*Appellant.*
NA'RA'YAN ACHA'RYA .....*Respondent.*

Inamdár—*Rent—Power to Raise Rent—Government Survey.*

An *inámdár*, though he cannot eject his tenants who have been in possession before the grant of the *inám* as long as they pay the rent due for their land, may nevertheless raise such rent at his pleasure, (they not having acquired a prescriptive title) and is not restrained in doing so by the rates fixed by the Government Survey.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Assistant Judge at Sáttará, in Appeal suit No. 239 of 1868, amending the decree of the Munsíf of Sáttará.

The plaintiff, Náráyaṇ Achárya, sued to recover from the defendants, Hari Joti and others, rent for the year 1863-64 for some land which he alleged they had held from him, it being his ancestral *inám*. The plaintiff alleged that, as he had a right to demand any rent he pleased, in October 1862 he sent a registered notice to the defendants, saying that they must pay Rs. 150 a year. This they did not do, but paid Rs. 75 only. He therefore sued to recover the balance from the defendants severally.

The defendants answered that the land was their *mirás*; that in the time of the Mahárájá they paid the plaintiff Rs. 80 *cháudvaḍi*; that by the survey the assessment was fixed at Rs. 107; that they were not liable to pay the amount demanded by the plaintiff, since he has by his *sanad* a right to demand Rs. 80 only, and that the plaintiff, had sued to eject them but had failed to do so.

The suit was brought in the Court of the Mámlatdár, but under the new Act (*a*) it was transferred to that of the Munsíf, who found that the amount demanded by the plaintiff was excessive, but that the defendants were liable to pay what was demanded.

The issues framed on appeal were:—

(*a*) Bombay Act II. of 1866.

1869.
HARI JOTI v. NA'RA'YAN ACHA'RYA.

"1. Had the plaintiff a right to demand Rs. 150 rent for the land?

"2. Have the defendants proved that they have acquired a prescriptive right to enjoy the land at any less rent?

"3. Did the defendants pay the *judi*, and if so, what ought to be deducted on that account?"

The finding of the Assistant Judge on these points was:—

"On the first two points the Appellant certainly does not rely much, and all I need say is, that, unless under certain circumstances, the *inámdár* has a perfect right to raise the assessment of his land, and this right was recognized by Government in what are called the Joint Rules at the time of the Survey.

"On the second point the defendants have not proved that they have had the land at an uniform assessment for such a time as has given them a prescriptive right to pay that uniform assessment in future. In fact the defendants' *kaifayat* itself almost contains an admission that they were liable to pay the survey assessment, which was an increase over their former assessment, and they seem to have paid the higher rate, namely, Rupees 107. Their payment, therefore, has not been uniform for thirty years.

"On the third point I find, from the evidence afterwards produced, that the defendants did pay Rupees 33-7-0 as *judi*, and, as this is a charge which the plaintiff, as *inámdár*, is liable for, both parties' pleaders admit that it must be deducted. I therefore deduct this sum from the amount awarded by the Munsif, and find for the plaintiff in Rs. 41-9-0 with costs in proportion."

The case was heard before COUCH, C.J., and GIBBS, J.

Dhirajlál Mathurádás for the Appellants:—When the land was given in *inám*, on the 3rd of November 1829, by the Rájá of Sattárá it was assessed at Rs. 60. In 1860 the plaintiff sued to recover possession, but his claim was rejected on the ground that the *inámdár* was the assignee of the assessment, and that the defendants were in possession when the assignment was made. He then sent a notice to increase

1869.
HARI JOTI v. NA'RA'YAN ACHA'RYA.

the rent. It is contended that he has no right to levy more than the rates fixed by the survey. The defendants were tenants prior to the *inám* grant (*vide* para. 11 of Exhibit No. 31). There was a general survey in the country and the land in dispute was surveyed and assessed at Rs. 107. [COUCH, C. J. —The *inámdár* cannot deprive the tenants of possession, because they had it before the grant and under the Government; but he is not bound to observe the Government rules in regard to assessment.] The question is, whether there is any limit to the *inámdár's* right to increase the rent. [GIBBS, J. —The *inámdár* having to live on his *inám* may fairly levy a higher rate than what is levied by Government, but if the assessment is such as to show that the object in putting the excessive rent on is virtually to eject the tenant, the case would have to be considered.] The plaint does not seek to make all the defendants liable jointly.

Vishvanáth Náráyan Mandlik for the Respondents.

PER CURIAM :—The Court amends the decree of the Acting Assistant Judge by ordering that Rs. 41-9-0 be paid by the several defendants in the proportions in which Rs. 75 are claimed from them in the plaint. The costs of the Special Appeal to be borne by the Special Appellant.

Decree amended.

Special Appeal No. 633 *of* 1868.

Feb. 16.

SAYAD VALIMIA' ALIMIA' *et al*.....*Appellants.*
GULA'M KA'DAR MOHIDIN.....*Respondent.*

Muhammadan Law—Gift of land—Interest of Donees not defined—Possession—Receipt of rent.

A gift of land made by a Muhammadan is invalid if the interest of each of the donees is not defined by the gift.

Semble, that the continued receipt by the donees of the rents of land, which had been let by them as the managers of the donor, is not a sufficient taking possession to satisfy the requirements of the Muhammadan law.

THIS was a Special Appeal from the decision of H. Phillpotts, Acting Senior Assistant Judge at Broach, in Ap-

1869.

SAYAD VALIMIA' ALIMIA' *et al.* v. GULA'M KADAR MOHIDIN.

peal Suit No. 2 of 1868, confirming the decree of the Munsíf of Jambusar, who had rejected the claim of the plaintiffs.

The plaintiffs, Sayad Valimiá and another, sued the defendant, Gulám Kádar, to recover possession of land that had belonged to Begam Jen, who, they alleged, died on the 3rd January 1865, and had given the land in gift to them on the 17th of December 1864.

The following is an extract from the finding of the Senior Assistant Judge:—

"The *Bakhshisnámá* (deed of gift), by which the plaintiffs allege to have been endowed with the land, is not according to the Muhammadan law, so there is no use in inquiring whether it is proved or not.

"The *Bakhshisnámá* is invalid for two reasons—(1) that it is a gift to two parties, and yet the interest of each donee is not defined: see Macnaghten's Principles of Mahomedan Law, Bk. I. Chap. v. sec. 8; and (2) that no delivery of the thing given ever took place; for the plaintiffs do not say in their plaint that the land was ever in their possession, much less that, at the time of the gift, or afterwards, it was given into their possession, and there is no evidence of it. So the *Bakhshisánmá* is void: Macnaghten Bk. I. Chap. v. sec. 4."

From the decree of the District judge the plaintiffs appealed, and the appeal was heard before COUCH, C. J., and WARDEN, J.

Dhirajlál Mathurádás for the Appellants—Baillie lays down (p. 515) "that the gift of a *moosháâ* in property that admits of partition, to two men or to a group, is valid according to the two disciples, and invalid according to Aboo Huneefá. But it is not void; so that it avails to the establishment of property by possession;" and according to the Hedaya also, such gift is valid according to the two disciples: see Vol. III. p. 289.

Now, as to possession, we had it during the lifetime of the Begam, so no formal delivery was necessary, and the rent notes, Nos. 12 to 14, which are taken in our name as the

managers of the Begam, show that we had the management of the property. Baillie also lays down (p. 514) that "when the subject of gift is in the hands of the donee, either as a deposit or commodate loan (*areeut*), or trust (*amánut*), he becomes the proprietor of it by the gift and acceptance, though his taking formal possession of it should not be renewed," and this is also borne out by the Hedaya, Vol. III. p. 295. We let the lands and received the rents, and that was a sufficient possession in us, since possession does not necessarily mean *actual* possession.

1869.
SAYAD VALIMIA ALIMIA' *et al.* v. GULA'M KA'DAR MOHIDIN.

Shántárám Náráyan for the Respondent—In cases of such gifts the share of each should be defined: Macnaghten's Principles of Mahomedan Law, Bk. I. Ch. v. pars. 6 and 7; Precedents p. 199, Cases IV. and V.; I. Morley's Digest p. 268, Cases 56 to 59. According to Elberling, sec. 276, a gift is invalid even if the division takes place after the gift according to the mode prescribed by the donor.

COUCH, C. J.—The Court below has correctly found against the plaintiff, on the ground that the interest of each of the donees was not defined by the gift. That being so, the ground of want of possession does not arise. We may, however, say that, we think, there was not in this case such a possession in the donees as would satisfy the requirements of the Muhammadan Law. I think we must confirm the decree with costs.

WARDEN, J., concurred.

Decree confirmed.

Referred Case.

Feb. 16.

JETHA'BHA'I BHAICHAND ..... *Plaintiff.*
BA'I LAKHU ..... *Defendant.*

Small Cause Court—Jurisdiction—Property taken in execution.

A suit brought by a Decree holder, to decide whether moveable property taken in execution is or is not the property of his judgment debtor, is not a suit cognizable by a Court of Small Causes.

GOPALRA'V Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád under section 22 of Act XI. of 1865, submitted for the decision of the High Court the

1869.

JETHA'BHA'I BHAICHAND v. BA'I LAKHU.

question—Whether or not a suit instituted for the purpose of proving that certain moveable property, consisting of gold and silver ornaments, and brass and copper pots, and clothes, is the property of his judgment debtors and therefore liable to attachment in execution of the decree obtained by the plaintiff, is maintainable in a Small Cause Court.

"The plaintiff having obtained a decision against one Kasanlál and Ishvar, attached certain property in the possession of the defendant, an alleged kept woman of Kasanlál: on her application the attachment was removed under section 246 of Act VIII. of 1859. The plaintiff, dissatisfied with the summary order, has instituted a regular suit, the object of which is to show that the property in question is the property of the judgment debtors.

The defendant states that the suit is not maintainable in the Small Cause Court, as it involves a question of title.

I find that in the Calcutta Weekly Reporter there are three analogous cases, the decisions on two being in support of the defendant's objection (*a*), and one being against it (*b*). The question appears doubtful and I have thought it proper to submit it for decision.

In my opinion the suit is for personal property and therefore maintainable in this Court under Section 6 of Act XI. of 1865.

PER CURIAM (COUCH, C.J., and WARDEN, J.):—The Court is of opinion that the suit is not maintainable in a Small Cause Court.

(*a*) 9 Calc. W. Rep. Civ. R. 136, and 10 Ibid. 141.
(*b*) 2 Calc. W. Rep. Civ. R. 43.

Civil Petition.

1869. Feb. 18.

CHINTA'MAN NA'RAYAN.....*Petitioner.*
MA'DHAVRA'V VENKATESH .....*Opponent.*

Jurisdiction—Rent, suit for—Title to land incidentally determined.

A suit to recover the rents of land situated in District T. may be brought in District S. *where the defendant is residing*, although in such suit the plaintiff's title to the land in respect of which the rent is sought to be recovered may incidentally come in question.

THE Petitioner, Chintáman, filed a suit in the Court of the Principal Ṣadr Amín at Sattárá to recover from the defendant, Mádhavráv, the balance of the rents and profits of certain lands situated in the District of Tháṇá and Sattárá. The Principal Sadr Amín rejected the plaint on the ground that he had no power to try the case, and his order was confirmed by the District Judge, R. F. Mactier, who made the following order:—

"This claim being for a portion of the revenues of land in the Tháṇá District, will the claim lie in a Court of the Sattárá District?

"I am decidedly of opinion that this claim *will not lie* in a Sattárá Court. Sec. 5 of the Civil Procedure Code shows very clearly that if in the case of suits for land, or other immoveable property, such land or property be in the limits of a Court's jurisdiction, that Court may try the case; but here the land in question is situated in the Tháṇá District, out of the Sattárá Court's jurisdiction, and the defendant denies the plaintiff's claim altogether; so that, in deciding the case here, we should have to enter into questions of right to property *not* in this District, and I think it clear that in such a case the claim must be laid in the Court having jurisdiction over the property of which a portion of the revenues is claimed; and, this being the case, this Court has no jurisdiction over the revenues of land in the Tháṇá District. The defendant has traversed the plea of the plaintiffs, and they, therefore, would be bound to show, that they had a share in the *inám* land situated in Tháṇá, and how could they do this

1869.
CHINTA'MAN NA'RAYAN v. MA'DHAVRA'V VENKATESH.

in a Sattárá Court? I can only account for the claim ever being admitted on the file in this way—that it was filed on the last day of December 1864, on which day more bad claims were filed, than were filed ever since Courts were appointed in this country, and the press of work would be the only ground for receiving the suit without examination. I concur with the lower Court that the claim will not lie in a Court of this District, and confirm the decree with costs on the plaintiffs."

The case was argued before TUCKER and WARDEN, J.J.

Shántárám Nárayán, for the Petitioner, contended that, as the defendant was personally subject to the jurisdiction of the Sáttará Court, the suit would lie. He cited *Denonáth Sreemoney* v. *Hogg* (*a*); *Rátanshánkar Revánshánker* v. *Gulabshánkar Lálshánkar* (*b*); *Penn* v. Lord *Baltimore* (*c*), and cases there referred to; Civ. Proc. Code by Broughton, Notes to sec. 5.

Vishvanáth Nárayán Mandlik contrá. As the title to the land is disputed the suit must be tried in the district in which the land is situated.

PER CURIAM:—The Court are of opinion that the suit is not for land or other immoveable property, but to recover from the defendant the balance of certain rents and profits which it is alleged that the defendant has received on the plaintiffs' account, and has neglected to pay over.

The Courts at Sattárá had jurisdiction over a claim of this character if the defendant, as seems to be admitted, dwells within their territorial limits, and if necessary, could adjudicate upon the plaintiff's title to the said lands, though they may be situate in another District. The Court therefore reverses the orders of the District Judge and of the Principal Sadr Amín, and directs that the Court of first instance do proceed to dispose of the suit according to law.

Order made.

(*a*) 1 Hyde 141. (*b*) 4 Bom. H. C. Rep. A. C. J. 173.
(*c*) 1 Ves. 444; T. C. 2 White & T. L. C. Eq. 837 (3rd ed).

1869.
March 2.

Special Appeal No. 635 of 1868.

NA'NA'BHA'I RUSTAMJI .....*Appellant.*
PESTANJI JAMSETJI .....*Respondent.*

Tenant from year to year—Notice to quit—Six months' notice.

When there is no custom of the country to the contrary six months' notice to quit is proper notice. This period must have elapsed before the plaint is filed, and the time occupied in the suit before decree cannot be counted.

THIS was a Special Appeal from the decision of N. M. W. Daniell, Acting Judge of the District of Súrat, in Appeal suit No. 120 of 1868, confirming the decree of the Munsif of Balsár.

The plaintiff brought this suit to recover from the defendant possession of certain land. He also claimed to recover rent for the same for two years and ten months. The following is a translation of the agreement under which the defendant held the land from the plaintiff:—

"I will pay you every year the amount of the said rent as it falls due. If I do not pay the rent and you ask (me) to vacate your land, I will then (immediately) duly vacate and make over the land to you. If you call upon me to vacate the land and if I do not vacate it, or even pay the amount of the rent, you are at liberty to compel me by a suit to vacate the land."

The defendant replied that only eight yards of the land belonged to the plaintiff; that the land on the north side did not belong to the plaintiff alone; but that a portion belonged to one Kolobhái, and that rent was due only for the current year.

The Munsif held that the plaintiff was entitled to recover possession of the land, and that the claim for rent was proved to the extent of Rs. 24-2-8.

In appeal the Acting Judge delivered the following judgment:—

1869.
NA'NA'BHA'I RUSTAMJI v. PESTANJI JAMSETJI.

"The appellant argues that, according to the terms of the lease, the respondent can only recover possession if the appellant fail to pay the rent. I do not see that this point was distinctly raised in the lower Court, but it is one which may be considered now, as the appellant's arguments are confined to the virtue of the bond. I do not read the bond to mean that the owner is barred from recovering so long as the rent is paid. The clause says, that if the rent be not paid, the owner may at once resume the land. The lease is for no definite period; and to construe the lease as an interminable instrument at the option of the appellant, would, in my opinion, be a misinterpretation of the agreement and would be inequitable. The clause seems to me to mean that the appellant, so long as he pays rent, can prevent the respondent recovering immediate possession, if cause be shown for delaying recovery.

"It is argued that in the bond it is agreed that the rent shall be paid annually. The present award has been for ten months' rent. The cause of action could not arise until the expiry of a year.

"On the first issue, I rule that the respondent can recover possession of the land; on the second issue, although the terms of the bond are for the payment of an *annual* rent, I consider in Equity that the respondent is entitled to the rent for the portion of the year preceding recovery, and that the right of recovery arose when he took action to recover possession of the land.

"I rule that the claim to rent is proved to the extent awarded in the lower Court. The decree of the lower Court is confirmed with costs."

The case was heard this day before COUCH, C.J., and GIBBS, J.

Nánábhái Haridás for the Appellant:—The Judge has held that rent was not due at the time when possession was demanded and we had no notice of the tenancy being determined.

Shántárám Náráyan for the Respondent:—The lease is not terminable only by default of payment. Whether we have put an end to the lease has not been determined. Here the period occupied by this suit was a sufficient notice of the determination of the tenancy as ruled by this Court: *Nasavanji Hormásji* v. *Náráyan Trimbak*. (*a*).

COUCH, C.J.—The lease (No. 2,) cannot be construed as creating more than a yearly tenancy, as we find no words in it indicating that the tenancy was to be for a longer period, or of a permanent nature. It was by its terms determinable by failure to pay the rent annually, or by a reasonable notice. A Court of Equity will relieve upon payment of the rent, when possession is demanded on the ground that the rent due had not been paid. Now, what is a reasonable notice depends upon the custom of the country; and in the absence of any custom, six months' notice would, I think, be a fair one. (*b*) In order to enable the plaintiff to recover in this case, he should show a failure of payment and a demand of possession, or that he had determined the tenancy by a notice. The plaintiff sued for rent for two years and ten months, but, on the defendant's alleging that he had paid the rent for two years, the plaintiff gave up his claim for that (*vide* Exhibit No. 9). The motive under which the plaintiff did this does not appear, but the claim was withdrawn, and the rent found due was only for ten months; consequently, we cannot hold that there was a failure to pay the rent. We must therefore consider whether there was a notice to quit. The plaint was brought soon after the demand for possession was made; so there was no notice, and I cannot assent to the doctrine that the defendant can avail himself of the time occupied by this suit. We must, therefore, reverse the decrees of both the lower Courts on the ground that the tenancy had not been determined when this suit was instituted. The plaintiff will be at liberty to bring a fresh suit upon a determination of the tenancy since the institution of the present suit, either by a proper notice, or by a failure to pay rent.

(*a*) 4 Bom. H. C. Rep. A. C. J. 125.

(*b*) *Vide* Sec. 43 of Bombay Act I. of 1865.

1869.
NA'NA'BHA'I RUSTAMJI v. PESTANJI JAMSETJI.

GIBBS, J.—I concur. With regard to the case of *Nas serwánji* v. *Náráyán* (*suprá*) in which we held that the institution of the suit, which had lasted for more than two years, might be held to be a sufficient notice to quit, the facts were very peculiar. There, the agent of an *inámdár* gave lands on *suti* tenure without the consent of the *inámdár*, and it was found by us that the agent was guilty of fraud. It was urged there also that there was no notice to quit, but the tenants were considered *participes criminis*, I think, and, therefore, we thought they might be turned out without any notice.

COUCH, C. J.—If so, the tenants were not entitled to any notice to quit, seeing that they had got the land from an unauthorized person.

Decrees reversed.

March 2.

Special Appeal No. 629 *of* 1867.

NAROTAMDA'S BHAGTA'NDA'S.....*Appellant.*
DAYA'BHA'I ICHHA'CHAND.....*Respondent.*

Insurance Policy—Notice of loss—Limitation—Act XIV. of 1859, *sec. 1. cl.* 10—*Mercantile usage.*

A suit for the recovery of the amount due on a Policy of Marine Insurance falls under cl. 10 of sec. 1 of the Limitation Act.

In such cases the limitation (in the absence of a custom allowing a certain time of grace) begins to run from the date when the defendant has notice of the loss and refuses, or neglects, to pay.

THIS was a Special Appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 118 of 1866, confirming the decree of Lallubhái Gopáldás, Munsif of Súrat.

The Special Appeal was argued on the 28th January 1868 before TUCKER and WARDEN, J.J.

The facts appear from the judgment of the Court.

Shántárám Náraydn for the Appellant.

Dhirajlál Mathurádás for the Respondent.

Cur. adv. vult.

1869.

NAROTAMDA'S BHAGTA'NDA'S v. DAYA'BHA'I ICHHA'CHAND.

TUCKER, J.—This is a Special Appeal from a decision of the District Court at Súrat given on an appeal from a decree of a Munsif's Court in that city.

The action was brought on two policies of insurance, which had been subscribed by the defendant's firm on the 13th of May and 3rd of June 1861 respectively, by which the said firm had assured for definite sums certain cargoes of merchandize which were to be shipped on certain specified vessels on a voyage from Bombay to Súrat. The plaint alleged that the goods had been shipped and a portion of them lost during the voyage, and by the perils covered by the policy, and the plaintiff claimed to recover Rupees 2,121-6-1 on account of the said loss, with interest on the above sum aggregating Rs. 521-4-2. Total amount sued for Rs. 2,642-10-3.

The defence was—(1) that the claim was barred by the law of limitation; (2) that, though the policies had been signed by the defendant's firm, yet no suit could be maintained on them; (3) that there was no stipulation in the policies that the defendants were to be responsible for such goods as were described in the plaint; (4) that, if the plaintiff proved the actual shipment of any goods described in the policy and their loss by the perils assured against, the defendants would pay such loss; (5) that the plaintiff was not entitled to interest.

The suit was instituted on the 28th of July 1864.

Both the lower Courts decreed for the defendants, as they held that the maintenance of the suit was barred by Act XIV. of 1859, sec. 1. cl. 10, inasmuch as more than three years had elapsed from the date when the plaintiff first heard of the loss of the goods, which the District Judge and the Munsif both considered to have been the time when a cause of action first accrued to him.

It has been contended for the Special Appellant (plaintiff) that a wrong clause of the limitation Act has been applied to the case, as the suit was not to recover money lent or

1869.

NAROTAMDA'S BHAGTA'NDA'S v. DAYA'BHA'I ICHHA'CHAND.

interest or for the breach of any contract, and consequently it did not come within clause 9 or 10 of sec. 1 of Act XIV. of 1859; that it was a suit for which no term of limitation had been expressly provided, and so, under cl. 16 of sec. 1. of the same Act, it could be instituted within a period of six years from the time when the cause of action arose; further, that it had been stipulated in the policies that, in case of any loss by the perils assured against, the custom of Bombay in the matter of English policies was to be followed, and, consequently, the agreement was subject to a custom which allowed to the underwriters a term of six months from the date on which they were advertized of the loss, till the expiration of which they could not be compelled to discharge their obligation; that this custom should have been taken into account, and then the plaintiff's cause of action would not have accrued till after the lapse of six months from the date when the defendants received notice of the loss.

On the other hand it has been urged for the Special Respondent that the foundation of the action was an alleged breach of contract by the defendants, and that, consequently, it had been rightly held by the District Judge that it fell within cl. 10 of sec. 1. of Act XIV. of 1859; that further, the District Judge had found that the plaintiff had failed to establish the custom he alleged, namely, that it was the usage of Bombay with reference to English policies of insurance that the underwriters should not be required to pay till six months after they had received notice of loss, and, consequently, the plaintiff was bound to sue when his cause of action first arose, *i. e.*, when he, plaintiff, first received notice of the loss.

We are of opinion that the Law of Limitation, which governs this suit, is cl. 10 of sec. 1. of Act XIV. of 1859. The action was instituted to compel the performance of a contract of insurance, and it comes within the definition of a suit for the breach of a contract, inasmuch as it was the defendant's refusal to perform his part of the contract, after he had received notice of the loss of the goods which had been insured, which formed the foundation of the action. The

lower Court's have, therefore, applied the right clause of the Limitation Act to the case, but they appear to have erred in deciding that the statute began to run against the plaintiff from the date when he (the plaintiff) first heard of the destruction of the goods. On this point we entertain a different opinion, as we consider that the defendants were under no obligation to pay till they had received notice of the loss, and that the plaintiff's right of action did not accrue till the defendants had received this notice, and had refused or neglected to make good the loss which had been notified to them. Now, it may be remarked that the date when the fact of the loss was communicated to the defendants has nowhere been stated, nor indeed does the plaint mention the precise date when the loss was first heard of by the plaintiff, as has been erroneously declared by the Judge; all that is said in the plaint is that the loss took place *subsequent* to Vaishákh Vadya 11th, Samvat 1917 (4th June 1861). As the date thus mentioned is the day following the date on which the second policy was signed, it seems probable that the news of the loss may have reached the plaintiff some time later; but both the lower Courts have, without first questioning the plaintiff, assumed that he heard of the loss on that day, and have held that he forthwith acquired a right to sue on that date. This is, in our opinion, a mistake, and, before it can be determined whether the maintenance of the suit is barred or not, it must be ascertained when the defendant had notice of the loss and repudiated his obligation, and the last of these dates will be the date when the plaintiff's cause of action first arose, unless indeed there should have been any such custom as has been alleged on behalf of the plaintiff by which the underwriters were allowed a term of six months for the discharge of their obligation. It was stipulated in the contract that, if a loss occurred, the settlement was to be in accordance with the custom of Bombay with reference to English policies; and, consequently, if there was any custom of this description among English or Native merchants at Bombay with respect to English policies, the defendants would have been able to claim the benefit of this custom; and the plaintiff could not have sued to recover payment

1869.

NAROTAMDA'S BHAGTA'NDA'S v. DAYA'BHA'I ICHHA'CHAND.

till the term had expired. The Court of first instance raised no issue as to the existence of such a custom and gave no decision on the point. The District Judge has declared that in his opinion the plaintiff has failed to establish that there was any rule of the kind among English merchants, but he has come to this conclusion without noticing that the Court of Original Jurisdiction had omitted to raise the question or to take evidence with respect to it. Under these circumstances we must reverse the decrees of the District Judge and Munsif and remand the cause to the Court of first instance that the dates we have mentioned may be ascertained, and the existence of the custom inquired into, and that the issue respecting limitation may be determined with reference to the principles which we have laid down. If the decision on this issue be ultimately in favour of the plaintiff, the Court of first instance must then proceed to dispose of the remaining points in dispute between the parties, and pass a new decree on the merits, in which costs, including the costs of this Special Appeal, shall be apportioned.

Civil Petition.

Jan. 7.

PA'NA'MCHAND valad SURAJMAL ..... *Petitioner.*
BHIVRA'J valad DASHRA'T ..... *Opponent.*

Limitation—Decree payable by Instalments—Execution—Act XIV. of 1859. Sec. 20.

Where the decree of a Civil Court is made payable by instalments, the time barring the execution of such decree under sec. 20 of the Limitation Act does not commence to run until the first instalment becomes payable.*

THE petitioner obtained a decree, upon the 22nd of January 1863, against the opponent for payment of the amount thereof by instalments. The first instalment became payable on the 1st of February 1864.

On the 26th of January 1866, the petitioner applied for the execution of the decree, but the Munsif of Nevása rejected the application, on the ground that it had not been presented within three years from the date of the decree sought to be executed.

* See post No. 15

1869.
PA'NA'MCHAND SURAJMAL v. BHIVRA'J DASHRA'T.

This order was confirmed on appeal by the Judge, A. St. John Richardson.

The petition was heard before NEWTON and TUCKER, J.J.

Dhirajlál Mathurádás for the petitioner.

The opponent was not represented.

PER CURIAM :—The Court finds that the decree is payable by instalments, and that the first of these instalments became payable on the 1st of February 1864. As no application for the execution of the decree could be made till the time fixed for the payment of the first instalment had elapsed, the above date must, for the purposes of sec. 20 of Act XIV. of 1859, be looked upon as the date of the decree; and the application for execution, presented on the 26th of January 1866, was consequently within the time prescribed by law. The Court directs the orders of the lower Courts to be reversed, and the application to be remitted to the Court of first instance, in order that the remaining objections, if any, may be disposed of. Costs in this Court to be borne by the defendant, the judgment debtor.

Civil Petition.

Jan. 21.

MANCHHA'RA'M KALLIA'NDA'S .....*Petitioner.*

RATILA'L LA'LSHANKAR .....*Opponent.*

Limitation—Execution—Summary Decision—Civ. Proc. Code, sec. 246—*Act XIV. of* 1859, *sec.* 22.

The words " unless some proceeding shall have been taken within one year, &c" in sec. 22 of Act XIV. of 1859, must be read as excluding the day on which application to enforce a summary decision is made.

The petitioner applied, under sec. 246 of the Civil Procedure Code to remove an attachment placed on his property. On the 8th July 1867, the Court passed an order releasing the property from the attachment with costs.

On the 8th July 1868, the petitioner applied to execute that order as to the costs.

Held, that he was in time.

Semble. An order under sec. 246 of the Civ. Proc. Code is a summary decision within the meaning of sec. 22 of the Limitation Act.

THIS was an application to set aside an order made by C. G. Kemball, Judge of the District of Súrat, on the 31st of July 1868.

1869.

MANCHHA'RA'M KALLIA'NDA'S. v. RATILA'L LA'LBHANKAR.

The facts of the case appear sufficiently from the following order of the Judge:—

"It appears that the appellant in this case applied, under sec. 246 of the Civil Procedure Code, to the Court to remove an attachment placed on certain property of his at the instance of the judgment-creditors of some other person. The Court allowed the objection with costs on the 8th July 1867. On the 8th July 1868, the appellant applied to the Court to execute the decree or order in respect of the costs, but the Court held that by sec. 22 of the Law of Limitation the application should have been made within one year, and, as the 8th July 1868 was not within the prescribed limitation it rejected the application. Against that decision the plaintiff, (applicant), now appeals, and asks this Court to call for the papers in the case, but I have no doubt that the decision of the lower Court was perfectly correct. The order passed on his petition of objection to the attachment was clearly of the nature of a summary decision, and the order respecting costs was part and parcel of the order allowing the appellant's objection, so that the case comes within the provisions of sec. 22 of the Limitation Act and the application to enforce must, therefore, be made within one year. The day, 8th July 1868, on which the application was made, being without the limitation of one year, the decision was no longer capable of being enforced. I, therefore, refuse this application."

The case was heard this day before NEWTON and TUCKER, J.J.

Dhirajlál Mathurádás for the applicant. This is not a decree in a summary suit. The application was under sec. 246 of the Code of Civil Procedure, and, therefore, sec. 20 and not 22 of the Limitation Act applies: *Puresh Narain Roy* (*a*). [NEWTON, J.—That case relates to sec. 11 of Act XXIII. of 1861, which does not give you a suit, and, therefore, the inquiry may not be a summary one; but here your application was under 246 of the Code, and you have a regular

(*a*) 9 Cal. W. Rep. Civ. R. 458

suit, so the inquiry is necessarily summary]. The word 'order' in sec. 20 of the Limitation Act is general and is not limited to cases in matters of execution between the same parties. It has been ruled by the Calcutta High Court that the day on which an application is made should be excluded in counting the three years under sec. 20 of the Limitation Act: *Brojo Beharee Sahoy* v. *Kewal Ram* (*b*). The same rule should be applied to sec. 22.

PER CURIAM:—The Court considers that the word "proceeding," in sec. 22 of Act XIV. of 1859, must be read as excluding the day on which the application referred to is made. In the present case, therefore, the application, made on the 8th July 1868, is within the prescribed time.

The order of the Judge is reversed, and it is directed that the application be received and reheard. Costs of this application on the respondent.

(*b*) 10 Calc. W. Rep. Civ. R. 5.

Special Appeal No. 690 *of* 1867.

Jan. 22.

LA'DO LAKSHUMAN .....*Appellant.*
KRISHNA'JI SADA'SHIV *et al.* .....*Respondents.*

Attachment by Government—Uninterrupted possession—Limitation.

The plaintiff in 1861 sued to recover his share in a *watan*. The defendants had been in actual possession of it from 1811 to 1830, when the Government attached the *watan* and enjoyed its revenues till 1845. In 1846 it was restored to the defendants.

Held, that the defendants had uninterrupted possession for more than thirty years, under cl. 1 of sec. 1 of Reg. V. of 1827.

THIS was a Special Appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Ratnágirí in Appeal Suits Nos. 218 and 245 of 1867, amending the decree of Rágho Náráyaṇ, Munsif of Vengurlá.

The plaintiff, in December 1861, sued to recover his twentieth share in the *gávki watan* of the village of Vengurlá.

1869.

LA'DO LAKSHUMAN v. KRISHNA'JI SADA'SHIV *et al.*

The principal objection raised by some of the defendants was that the claim was barred by Reg. V. of 1827.

It was admitted that the plaintiff or his ancestors had not enjoyed any share in the *watan* since 1810 or 1811, when Vengurlá first came under the British Rule, and that, from 1830 to 1845, the *watan* was under the attachment of Government. Both before and after this attachment the *watan* was in the possession of the defendants. In 1846, the plaintiff alleged that an agreement was entered into by all the shareholders in respect of the *watan*.

Upon these facts, the Munsif held the claim barred, but, finding it proved to his satisfaction that the plaintiff was entitled to a twentieth share, passed a declaratory decree to that effect which decree he ordered should not be executed.

The Senior Assistant Judge also held the claim barred and threw out the plaintiff's claim *in toto*.

The Special Appeal was argued on the 2nd of March 1868, before NEWTON and GIBBS, J.J.

Bahiravnáth Mangesh for the Special Appellant (the original plaintiff). The Lower Appellate Court finds that the *watan* was under attachment by Government from 1830 to 1845. The defendants were, therefore, not in possession during this period. According to Reg. V. of 1827, sec. 1. cl. 1, there should be possession on behalf of the defendants for thirty years from 1845, the year in which the Government removed their attachment; for, the defendants' possession from 1810 to 1830 being interrupted by a subsequent dispossession, the time only began to run in their favour in 1845. Moreover, the revenues of the *watan*, during the period of attachment, were enjoyed by Government and not by the defendants. They were, therefore, not in possession in any sense. In two previous cases (Special Appeals 547 of 1865 and 222 of 1866) relating to the same property, the High Court held that the claim was not barred, for they considered that the defendants' possession was interrupted by the Government attachment. There should have been thirty years' possession from the time that attachment was raised.

Shántárám Náráyan for the Special Respondents (the original defendants). The defendants were in possession before and after the attachment. The possession of Government therefore during the attachment was on their behalf: Special Appeals Nos. 172 and 408 of 1866. The plaintiff could have sued both the defendants and the Government during the attachment.

Cur. adv. vult.

Jan. 29th.

NEWTON, J.—The suit was filed by the plaintiff, Láḍo, to recover his twentieth share in the *gávki watan* of the village of Vengurlá. The several defendants set up different defences. Some said that the agreement was never executed, others that it was never acted upon and that the plaintiff never had possession. The Munsif at first awarded the plaintiff's claim; but on remand made a remarkable decree. He gave a decree declaring the plaintiff entitled to a twentieth share, but ordered that his decree should not be executed. Mr. Naylor settled three issues—(1) Is the suit barred by Limitation? (2) If not, whether the plaintiff is entitled to any, and, if so, to what share of the *watan*? and (3) Whether, if the suit is barred by Limitation, the Munsif was right in passing a declaratory decree under sec. 15? He found the first issue in the affirmative; considered that there was no necessity for finding on the second; and found the third in the negative. He thus records his ground of decision:—"It is admitted that the plaintiff or his ancestors have enjoyed no part or share in the *gávki watan* at any rate since 1810 or 1811, when Vengurlá first fell under the English rule, and this claim was not brought until the month of December 1861. All that time the defendants or their ancestors had possession of the whole *watan* without any interruption whatever on the part of the plaintiff or his ancestors. It is true that for some years the *watan* was attached by Government, but I do not consider that that was an interruption such as is contemplated by cl. 1. of sec 1. of Reg. V. of 1827; for, although the *watan* passed temporarily out of the defendants' possession, it was restored to them when the reason for the attachment no longer existed—and they have

1869.

LA'DO LAKSHUMAN v. KRISHNA'JI SADA'SHIV *et al.*

continued in possession until the present time. As against the plaintiff, therefore, they have virtually held uninterrupted possession for at least fifty years before this suit was brought. The period of sequestration can no more be taken into consideration in a claim brought by the plaintiff, than one would think of deducting the number of years during which the *watan* might have been mortgaged by the defendants to some third party from the number of years during which the defendants proved that they were in possession uninterrupted by the plaintiff."

We have in this case to determine whether the action of Government was such as to prevent the defendants from taking advantage of the Limitation Act. Mr. Bahiravnáth has contended that, in a previous case between the same parties, Mr. Justice Westropp held that the dispossession caused by the Government attachment was an interruption to the defendant's enjoyment and that, therefore, the limitation ran from the time that interruption ceased. We have consulted Mr. Justice Westropp, and we are unable to use his opinion in favour of Mr. Bahiravnáth ; and Mr. Justice Gibbs, who sat with him in that case, is under the impression that the determination of it was based upon a different point altogether, and it is therefore not a precedent in point. Our opinion is very strong that the defendants' occupation was not interrupted by the Government attachment. As the Government, from some cause or other, sequestrated the *watan*, but finally considered that they were not justified in doing so, we must consider that they were holding it for the defendants.

This would have been decisive and would have enabled us to give a decree but for Mr. Bahiravnáth's objection about the agreement—whether under the circumstances the defendants were entitled to plead prescription. This point has not been decided by the lower Courts, and we consider that the cause should be remanded in order that the effect of the agreement, No. 63, may be inquired into and determined.

GIBBS, J.—I may add that my note of S. A. No. 547 of 1865 was insufficient to corroborate Mr. Bahiravnáth.

Decree reversed and suit remanded.

Civil Petition.

1869.
March 4.

UTAMRA'M MA'NIKRA'M.....*Petitioner.*
GIRDHARLA'L MOTIRA'M.....*Opponent.*

Limitation—Instalments—Decree payable by Instalments—Execution—Act XIV. of 1859, sec. 20.

When a decree awards payments by instalments, to be made at particular specified dates, the date when each instalment becomes due is to be deemed the date of the decree in respect of that instalment for the purpose of calculating the time within which execution may be issued to enforce payment of it.

THIS was an application to set aside an order of C. G. Kemball, District Judge of Súrat, declining to execute a decree ordering payment by instalments.

The order of the District Judge was as follows :—

"In this case it appears that Máṇiklál Govindrám, the appellant, obtained a decree on the 24th of April 1861, against Gordhandás Motichand for the sum of Rs. 900, it being ordered therein that the amount should be liquidated by instalments of Rs. 150 per annum. A Darkhást was presented on the 25th January last for execution in respect of three instalments which respectively became due in Samvat 1921, 1922, and 1923 (the first having become payable on the 27th of February 1865), the decree-holder alleging that the prior instalments had been adjusted out of Court.

"The Munsif threw out the application for execution on the ground that, as no proceeding had been taken to keep the decree in force within three years next preceding it, no process could issue under the provisions of the Limitation Act; and against that decision Máṇiklál now appeals. Two questions arise for consideration; namely, whether, assuming that private adjustments of the prior instalments had been made, the lower Court could, under sec. 206 of the Civil Procedure Code, take cognizance of such payments, so as to remove the case out of the Limitation Act, in other words, whether the payment out of Court was a proceeding which would keep the decree in force; and whether, in the event of the private adjustment being held not to be such a proceed-

1869.

UTAMRA'M MA'NIKRA'M v. GIRDHARLA'L MOTIRA'M.

ing, by the fact of the decree-holder having neglected to take any proceedings in execution within the time prescribed by sec. 20 of the Limitation Act of 1859, he was put out of Court in respect of those instalments which are within time.

"With reference to the first question my opinion is adverse to the appellant's claim. Sec. 20 of the Limitation Act clearly lays down, that no process of execution shall issue, unless some proceeding shall have been taken to keep the decree in force within three years next preceding the application for such execution, and sec. 206 of the Civil Procedure Code provides that 'no adjustment of a decree in part or in whole shall be recognized by the Court, unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred.' .

"No doubt on the face of it payment of a decree in part is such a proceeding as is contemplated in the section of the Limitation Act above quoted, but in order to render the payment legally sufficient to keep the decree alive it is essential that it should be made through the Court, or certified to the Court by the decree-holder, for without one or other of these acts the adjustment cannot be recognized. The object of sec. 206 of the Civil Procedure Code, as stated by the late Rámprasád Roy in his commentary, was 'to stop at once the false pleas of payment which used to be constantly set up by debtors to evade the effects of decrees, and, in some instances, by decree-holders to avoid the operation of the Law of Limitation.' The effect of a private adjustment is in fact *nil*, whether as regards the decree-holder or the judgment-debtor, neither can with any practical advantage plead payment out of Court. If the payments, which the appellant alleges were made, were true, it was the duty of the decree-holder, in order to protect himself, to observe the directions of the law, and he has only himself to thank for his want of caution. With regard to the second question I find I must also give it against the appellant. I was at first inclined to regard the decree for the payment of the

amount decreed by instalments as not one decree but a series of decrees, each one coming into force on the distinct instalment falling due, giving to the decree-holder a distinct right in respect of each, but after reading the judgment of the Calcutta High Court in a precisely similar case, *Tiluck Chunder Gooho* v. *Gour Monee Debee* (*a*), I think it inexpedient to follow out my view. The appeal is dismissed with costs on the applicant."

The case was heard before TUCKER and GIBBS, JJ.

Pánḍurang Balibhadrá for the petitioner.

Gopináth Sadáshiv for the opponent.

TUCKER, J.—This is an appeal from an order made by the District Judge on an application for the execution of a decree to which sec. 20 of Act XIV. of 1859 was applicable.

The petitioner held a decree payable by instalments, of which the first three instalments have been satisfied, he alleges, by payments out of Court. The fourth instalment only became due on the 27th of February 1865, and the petitioner applied to the Munsif's Court at Balsár, on the 25th of January 1868, to issue process to enforce the payment of the fourth instalment, and of all subsequent instalments which had accrued due.

The Munsif held that, as no proceeding had been taken to keep the decree alive within three years immediately preceding the present application for execution, no process could issue. He, therefore, rejected the petitioner's application, and his order was affirmed by the District Judge, on appeal, on the same grounds.

In this decision, the District Judge considered it right to follow a ruling of a Divisional Bench of the High Court at Calcutta, *Tiluck Chunder v. Gour Monee Debee*, though he was apparently not entirely convinced of the soundness of the interpretation of the law which had been pronounced.

We have very carefully considered the reasons given by the learned Judges at Calcutta (Justices Loch and L. S.

(*a*) 6 Cal. W. Rep. Mis. R. 92.

1869.

UTAMRA'M MA'NIKRA'M v. GIRDHARLA'L MOTIRA'M.

Jackson), for the judgment pronounced by them in the case which the District Judge has cited, but they are not satisfactory to our minds. It appears to us that, when a decree awards payments by instalments to be made at particular specified dates, the date when each instalment becomes due must be held to be the date of the decree with respect to that particular instalment, and for the purpose of enforcing the payment of that instalment. It would be obviously very inequitable, if a period of limitation were to commence to run against a decree-holder from a date earlier than the earliest date at which it would have been possible for him to obtain payment of a particular instalment, and we cannot suppose that the Legislature could have intended a result which would be so plainly opposed to all ordinary ideas of justice.

It has been already pointed out by the learned Chief Justice at Calcutta, Sir Barnes Peacock, (*b*) and has been noticed by different Judges of this High Court and of the High Courts in other Presidencies that, according to the literal wording of sec. 20, no process of execution could ever issue to enforce a judgment even within a week from the date of it, unless some proceeding were taken to enforce or keep it in force within three years next preceding the application for execution. The framers of this section have omitted to declare a term within which the first application must be presented, and apparently considered that there must always have been a previous proceeding, even anterior to the first one. In like manner they appear to have overlooked that there were decrees, by which payments were directed to be made at dates different from and later than the date on which the decree was passed. The *reductio ad absurdum*, to which a literal construction of this section would lead, has caused the Chief Courts in all the Presidencies to reject this construction, and to interpret the section in accordance with what appeared to the several Judges, who have adjudicated on the matter, to have been the real meaning of the Legislature, so far as it could be gathered from the general purport of the Act;

(*b*) 7 Calc. W. Rep. Civ. R. 515, cases 445 of 1866 and 719 of 1866.

and it seems to us, with respect to the question immediately under our consideration, that it will be right for us to follow a similar course.

The judgment of the Calcutta Court, from which we have expressed our dissent, was passed with reference to a decree to which sec. 21 of Act XIV. of 1859 was alone applicable; and, though the arguments of the learned Judges are founded on the language of both secs. 20 and 21, yet, strictly speaking, their decision must be considered as a judicial interpretation of sec. 21 only. In Bengal it has been ruled that these sections must be construed together, but at Bombay we have not been able to concur in this view; and there have been several recent rulings of this Court (*c*), which declare that each of these sections must be read and interpreted as conveying separate and distinct rules with reference to different classes of decrees. There are no words in sec. 20 which prescribe that the date, on which a decree has been passed, is to be the starting point from which the term of limitation is to run, and, in the absence of such words, it is a legitimate and reasonable construction that, in decrees payable by instalments, the date, when each separate instalment first becomes due, is the date from which the term of limitation must be held to commence, and consequently an application for execution made within three years from that date will be within time.

Under this view, we reverse the orders of the District Judge and of the Munsif, and direct that process of execution issue with reference to all the instalments of which execution has been sought which come within the rule we have laid down.

GIBBS, J.—Concurred.

(*c*) 3 Bom. H. C. Rep. A. C. J. 177, and 5 Ibid. 102.

1869.
March 4.

Civil Petition.

Ex parte KRISHNA' PA'DHE.

Practice—Appeal—Time for appealing—Holiday.

When the last day for presenting an appeal falls upon a Sunday or close holiday, an additional day is to be allowed for the presentation of the memorandum of appeal.

THIS was an application to set aside an order of J. R. Naylor, Acting Senior Assistant Judge of the Koṇkán at Ratnágirí, refusing to receive a memorandum of appeal.

The petitioner wished to prefer an appeal against the decree of the Munsif of Khárepátaṇ to the Senior Assistant Judge. The period within which it was necessary to prefer the appeal expired on the 21st of August 1868. But as that day was a holiday (Gaṇesh Chathurthí), the petitioner presented the memorandum of appeal on the following day. The Acting Senior Assistant Judge, however, rejected it, observing, "it is not proper to give the benefit of yesterday (to the petitioner) it being a regulation holiday and this appeal is time-expired."

The case was heard before TUCKER and GIBBS, JJ.

Shántárám Náráyaṇ, for the applicant, cited *Rajkisto Roy* v. *Deno Bundoo Surmah* (*a*), and relied upon the case there referred to.

TUCKER, J.—In accordance with the practice of this Court and that of the Courts in the other Presidencies, we are of opinion that an extra day should be allowed when the last day falls on a Sunday or on any other close holiday, and that, therefore, the petitioner is entitled to have an extra day, the last day on which he should have filed his appeal being a holiday.

We, therefore, reverse the order of the Senior Assistant Judge and order the appeal to be admitted.

GIBBS, J.—Concurred.

(*a*) 3 Calc. W. Rep. S. C. C. R. 6

1869.
March 9.

Referred Case.

LAKSHUMAN SAKHA'RA'M.....*Plaintiff.*
RA'NU bin SIDO'JI *et al*.....*Defendants.*

Calculation of time for performance of contract—Exclusion of date on which contract is made—Limitation—Act XIV. of 1859.

The date on which a contract is made is to be excluded in computing the time allowed for its performance.

The date on which a debt becomes payable is to be excluded in calculating the period of limitation.

CASE submitted for the orders of the High Court, by Bháskar Dámodhar, Acting Judge of the Court of Small Causes at Puṇá, under Act X. of 1867 :—

"The abovenamed plaintiff presented a plaint to this Court, on the 17th December 1868, for the recovery of Rs. 30-0-0, being the amount of principal and interest due on a bond dated Márgashirsha Vadya 14th, Shake 1786, corresponding with the 27th of December 1864. The plaint has not yet been registered, a doubt having arisen as to whether or not it was presented within the period allowed by the Limitation Act (No. XIV. of 1859).

"The time agreed upon for the payment of the debt is given in the bond as one year; the Maráṭhi words used being, '*Yási mudat ek varsháni vyáj mudal suddhá fadshá karún devu.*' The doubt is whether the debt became payable on Márgashirsha Vadya 13th, Shake 1787, corresponding with the 16th of December 1865, or on Márgashirsha Vadya 14th, corresponding with the 17th of December 1865, and whether or not the 17th of December 1868, on which day the plaint was presented to the Court, fell within the period of three years, allowed by cl. 9 of sec. 1. of Act XIV. of 1859. The solution of this doubt depends on the following questions which I have the honour to submit for the decision of the High Court under Act X. of 1867 :—

"1. When the time fixed for the performance of a contract is stated to be a certain number of years, months, or days, without specifying whether the date on which the

1869.
LAKSHUMA'N SAKHA'RAM v. RA'NU SIDOJI *et al.*

contract is made is to be included or excluded from the computation, should the period allowed for the performance of the contract be held to commence from the date thereof so as to include it, or from the day next following?

"2. In calculating the period of limitation allowed by sec. 1. cl. 9 of Act XIV. of 1859, should the period be computed from and inclusive of the day on which the debt became due, or from the day next following?

"I am respectfully of opinion that, except when the contrary is specified by the terms of the contract, the date on which a contract is made should be excluded in computing the period allowed for its performance. I am also of opinion that the day, on which a debt becomes payable, should be excluded in calculating the period of limitation under Act XIV. of 1859.

"At page 390 of 'Wharton's Law Lexicon' (3rd Edition) it is stated that '*From*' excludes the day from which the time is to be reckoned.' Sec. 38 of the proposed Contract Law for India provides that when an engagement is to be performed on a certain day without application, the person entering into the engagement has the whole of that day to perform the engagement in. With respect to Promissory Notes, Bills of Exchange and Cheques, the Indian Negotiable Instruments' Bill (published in a Supplement to the Government Gazette of 3rd October 1867) contains the following provisions:—

'A Promissory Note, Bill of Exchange, or Cheque made payable after the lapse of a stated number of months, is mature on the day of the month of payment which corresponds in number with the day when the instrument, if payable after date, is dated, or when, if payable after sight, it is presented. If the month of payment contains no corresponding day, the instrument is mature on the last day of such month.

'When a Promissory Note, Bill of Exchange or Cheque is made payable a stated number of days after sight, or after date, or after any other epoch, in estimating the number of

days, the first day is the day immediately following the day when the instrument payable after sight has been first presented for acceptance, or when the instrument payable after date is dated.

'EXCEPTION.—Where the day, when the instrument arrives at maturity, is not a day for the despatch of public business, the instrument is due on the next succeeding day of public business.'

"The words, 'from or after this date,' are not used in the bond to which this reference relates; but it is evident from the context that the words, '*ek varsháni*,' were intended to mean a year from the date of the bond. I consider, therefore, that as the bond is dated Márgashirsha Vadya 14th, Shake 1786, the debt became payable on Márgashirsha Vadya 14th, Shake 1787, corresponding with the 17th of December 1865, excluding the date of the bond in computing the year allowed for payment.

"I also consider that the debtor had the whole of the 17th of December 1865, for paying the debt, and that the three years allowed by sec. 1. cl. 9 of Act XIV. of 1859 must be calculated so as to exclude that day. If this view be correct, the 17th of December 1868, was the last day of the three years allowed by the Limitation Act and the plaintiff's suit is not barred."

PER CURIAM (COUCH, C. J. and WARDEN, J.):—The Court is of opinion that the date on which the contract was made should be excluded in computing the time allowed for its performance, and the day, on which the debt became payable, should be excluded in calculating the period of limitation, under Act XIV. of 1859.

1869.
Feb. 10.

Special Appeal No. 624 *of* 1868.

VITHOBA' BA'VA' .....*Appellant.*

HARIBA' BA'VA'.....*Respondent.*

Hindú law—Partition—House built upon family ground by a single member of a family.

Where a member of a joint Hindú family built (at his own expense with borrowed money) a house upon ground belonging to the family, it was held that each of the coparceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site.

THIS was a Special Appeal from the decison of A. C. Watt, Acting Assistant Judge at Sattárá, in Appeal Suit No. 681 of 1867, amending the decree of the Munsif of Rahimatpúr.

The plaintiff, Vithobá Bává, sued Haribá Bává for possession of a one-third share of the family property moveable and immoveable including a certain house built upon the family land.

The defendant, Haribá Bává, answered that the house he lived in was built by himself, and that, therefore, it was not liable to partition.

The Munsif found that Haribá Bává built the house, having borrowed money for that purpose, and that, therefore, it was not subject to division.

The judgment of the Assistant Judge on the point was:—

"I cannot see that the Munsif is wrong. Had we been able accurately to fix the date of separation, then we could have determined whether the house was built jointly or separately. This, neither the Munsif is, nor am I, able to do; and I agree with the Munsif, in thinking, that the weight of evidence goes to show, that the defendant built the house separately."

The case was heard before COUCH, C. J., and WARDEN, J.

Shántárám Náráyan for the Appellant:—Building the house separately is not the correct test in this case. The

house is admittedly built on ground belonging to the family. The defendant was the manager and may have borrowed the money to build the house, and it should have been ascertained how he repaid it.

Dhirajlál Mathurádás for the Respondent.

COUCH, C. J. —It is found as a matter of fact that the defendant, Haribá, built the house with money which he had borrowed; and, though the finding is not precise, it is clear that the house was built on ground belonging to the family. The point, whether the defendent was personally liable for the money which he had borrowed should have been raised in the Courts below; and as that has not been done we cannot allow it to be raised at this stage of the proceedings. According to the Hindú Law, if one build a house on ancestral land with separate funds of his own, the other members of the family have only a claim on him for other similar land equal to their respective shares (*a*). The plaintiff in this case must therefore be compensated for his share of the ground used for building the house. We, accordingly, amend the decree of the Appellate Court by ordering that, in addition to the one-third share of the other house and land thereby awarded to the plaintiff, the defendant Haribá do make over to the plaintiff so much of his the said defendant's share in the said house built by him, and in the ground on which it stands, as is equal in value to one-third of the site of the said house. Costs in proportion.

WARDEN, J., Concurred.

Decree amended.

(*a*) 2 Macnaghten P. H. L. 152.

1869.
March 3.

Special Appeal No. 552 *of* 1868.

RA'IJI MANOR *et al.* .....*Appellants.*
DESA'I KALLIA'NRA'I HUKMATRA'I .....*Respondent.*

Limitation—Hak *not payable out of land—Six years' limitation.*

When a *hak* is not charged upon, or payable out of, land, a suit for its recovery must be brought within six years from the last payment made on account of it.

A *pagdi* allowance for collecting a Desái *hak*, though deducted from the amount of such *hak*, is not payable out of land.

THIS was a Special Appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge at Broach, in Appeal Suit No. 173 of 1867, confirming the decree of the Ṣadr Amín of Broach.

The action was instituted by Ráiji and others to recover from Desái Kállianrái the arrears of their *pagḍi* allowance for saṁvat 1919 to 1922 (A. D. 1862-63 to 1865-66), alleging that Rs. 421-4-9 used annually to be paid to the defendant and his father from the Government Treasury for *Desáigiri hak;* that out of this, the defendant gave them Rs. 124-3-6 as *pagḍi* allowance, but that since the above year the defendant discontinued the payment.

The defendant, among other things, pleaded that the suit was barred by the law of limitation.

The Ṣadr Amín, Náráyaṇ Balvant, rejected the claim on the ground that, under clause 16 of section I. of the Limitation Act, the suit should have been brought within six years, but that this the plaintiffs failed to do.

In appeal, the Acting Senior Assistant Judge recorded the following finding:—

"This is a suit brought by certain members of the family of the Pátils of Jadeshvar to recover certain *haks* from Desái Kalliánrái Hukmatrái; he pleads among other things the law of limitations.

"The plaintiffs demur to the claim being barred by the law of limitation on two grounds, (1) that the money for

the *haks* in question has been received within six years by them; (2) that the twelve years' limit, not the six years' limit applies.

"With regard to the first objection the plaintiffs produced witnesses Nos. 17, 18, 19, 20, 21 whom the Ṣadr Amin did not believe, and from a mere perusal of their depositions, they are not trustworthy, because they are all either relatives of the plaintiffs or connected with them, and they do not agree either as to who was the giver or receiver of the said money, wherefore I decide that no payment of this *hak* has been made within six years.

"With regard to the second objection of the plaintiffs, it is that this *hak* is an interest in land, so the limit prescribed by Act XIV. of 1859, sec. I. cl. 12 applies to it; they quote S. A. No. 683 of 1863, *Bháratsangee* v. *Navanidharaya* (*a*); but the *hak* in question in that case was not the same as in this. The *hak* which was decided in that case to be an interest in land was a Desái's. This *hak* is one of a *paṛdi* allowance for collecting the Desái's *hak*, wherefore it is not an interest in land, because it is not like the Desái's *hak* collected on account of a certain village, but was only a right these people had of deducting a certain amount for their trouble in collecting it, wherefore it is not an interest in immoveable property, and I decide that it is not, and, therefore, according to Act XIV. of 1859, sec. I. cl. 16, the suit should have been brought within six years, and it has not been brought within that time. So I confirm the Ṣadr Amin's decree with costs."

The case was heard this day before COUCH, C.J., and GIBBS, J.

Pirosháh Merwánji Mehtá for the Appellants.

Shántárám Náráyaṇ for the Respondent.

COUCH, C.J. —The plaintiffs in their plaint seek to recover arrears of *paṛdi* allowance out of an allowance paid annually to the defendant by Government on account of *Desáigiri hak*.

(*a*) 1 Bom. H. C. Rep. 186.

1869.

RA'IJI MANOR et al. v. DESA'I KALLIA'NRA'I HUKMATRA'I.

The first question is whether the money claimed is an interest in land, and, if not, whether clause 16 of sec. 1 of Act XIV. of 1859 applies. The case which has been quoted (*b*) does not appear to me to be applicable. There the *hak* was paid by the Thákur, and it was a charge on the revenues and was not a payment out of the Government Treasury. This Court has held (*c*) that where *toḍá garás* is paid in cash it is not an interest in land, and I see no reason for not following that ruling. The present *hak*, therefore, not being an interest in immoveable property, clause 16, and not clause 12, of section 1 of the Limitation Act applies to it. Now, it being found that no payment has been made since 1857, the cause of action arose when the first payment became due after 1857, which was more than six years before the institution of the suit. If the plaintiff can pass that by and sue for payments becoming due within six years previous to the suit there will be no law of limitation. The law says that the suit must be brought within six years from the date on which the cause of action accrues. The right does not depend upon whether the arrears claimed are within the period of limitation. If this were the case, the right might exist for an indefinite period. It, therefore, appears to me that the right becomes extinct if no suit is brought within the proper time. We must confirm the lower Court's decree with costs.

GIBBS, J.—I concur. If I am not mistaken, the action upon the title had twelve years according to the old law, under which mesne profits also had the same number of years, and therefore the language of the late Ṣadr Court, that title was lost after twelve years, was correct. In the present case six years' arrears could have been recovered, so the period for title should be one and the same.

Decree confirmed.

(*b*) 1 Bom. H. C. Rep. 186.

(*c*) See *Mahárúnú Fatisangji* v. *Desái Kalyánráya* 4 Bom. H. C. Rep. A. C. J. 189, and cases there referred to.

1869.
March 10.

Regular Appeal No. 10 *of* 1868.

BHA'NDU valad RA'JA'RA'M .....*Appellant.*
DA'MA'JI valad JIVA'JI .....*Respondent.*

Registration—Priority—Verbal sale with possession—Registered deed—Act XX. of 1866, *sec.* 48.

Held, that a deed of sale of immoveable property, duly registered under Act XX. of 1866, was to be preferred to a prior verbal sale of the same property accompanied by possession, where it appeared that it was the intention of the parties to the verbal sale to complete the transaction by a deed.

Semble, that the effect would have been the same if there had been no such intention.

THIS was an Appeal from the decision of the Hon'ble G. A. Hobart, Judge of the District of Khándesh, in Original Suit No. 5 of 1867.

The plaintiff, Bhándu valad Rájárám, sued the defendant, Dámáji valad Jiváji, to recover possession of a house sold to the plaintiff by Bháu valad Nárobá, under a deed of sale dated 9th of January 1867, which was duly registered under Act XX. of 1866.

The defence of Dámáji was that Bháu valad Nárobá had, on the 3rd of January 1867, sold the house to him; that he paid the purchase money and got possession of the house, and that a formal deed of sale was to be passed to him, and that, therefore, his oral transaction should prevail against the subsequent sale to the plaintiff of which he (Dámáji) had no notice.

Náráyaṇ Malhár, a subordinate Magistrate, was made a defendant in the suit on the ground that a certain order issued by him in the matter of the possession of the house had caused damage to the plaintiff. The Judge, in consequence, himself tried the suit under section 43 of Reg. II. of 1827, and on the 6th of February 1868, gave judgment for the defendant. The plaintiff then applied for a review of the judgment and, the application having been granted, the following judgment was given by the Judge under date the 2nd of July 1868 :—

1869.

BHA'NDU RA'JA'RA'M v. DA'MA'JI JIVA'JI.

"This suit being called on for hearing with a view to revision of judgment, the same having been ordered under date the 13th of April last, it is urged orally by the defendants that, the plaintiff never having had possession, sec. 48 of the Indian Registration Act (XX. of 1866) does not apply to the case.

"After full consideration of the Registration Act (XX. of 1866) under which Bhándu's deed of sale was registered, I am of opinion, following the precedent of the decision of the High Court of Judicature at Calcutta in S. A. No. 1338 of 1867, *Bheemul Mahtoon* v. *Mussamút Olimussa*, (*a*) that I was at liberty to receive evidence oral or of other sort to prove the sale to Dámáji by Bháu Nárobá of the property in dispute with the purpose of ascertaining whether, previous to Bhándu's registered deed of sale, Dámáji and Bháu Nárobá had not purchased and sold that property. It is ruled in the decision in Special Appeal above adverted to that, notwithstanding the subsequent sale to a third party and registration of such subsequent deed, there is nothing in the Registration Law (which governs this case) to prevent a person from enforcing his (previous) contract.

"The result of this revision is, therefore, to confirm the decree given in this case under date the 6th of February A.D. 1868. Costs of this revision on Bhándu."

The case was argued before COUCH, C.J., and GIBBS, J.

Vishvanáth Náráyan Mándlik, for the Appellant, cited *Ramkumar Mandal* v. *Brajahari Mridhá* (*b*).

Govind Vithál Karkare and *Shántárám Náráyan* for the Respondent :—Sec. 48 of the Registration Act (XX. of 1866) does not apply to this case, as the sale to the defendant was completed by possession, and, at the time of the second sale, Bháu had no interest in the house to convey. The defendant opposed the registration of Bhándu's deed, and he in this way had notice of the prior sale.

(*a*) 8 Calc. W. Rep. Civ. R. 123.
(*b*) 2 Bengal Law. Rep. App. J. Civ. 75.

Sec. 48 of the Registration Act ought to be construed in the same spirit as analogous words in the old law were construed; sec. 2 of Act XIX. of 1843 and sec. 6 of Reg. IX. of 1827 were construed in such a way as not to affect previous *complete* transactions: *Syud Furzund Ally* v. *Syud Abdool Ruhim* (*c*).

Vishvanáth in reply cited *Boikuntonáth Sett* v. *Russick Loll* (*d*.)

COUCH, C. J.—Taking the evidence of the witness, No. 36, for the defendant Dámáji to be entirely true, it shows that the sale to Dámáji was intended to be by a deed of sale; since the witness says, "the Rs. 300 were then and there paid to Bháu Nárobá, and Dámáji told Bháu Nárobá to speak to his (Dámáji's) Gumastá, who was at Bhálode, and he would put his (Dámaji's) lock on it (the house). Bháu had said he would take off his lock. Bháu said he would give a deed of sale on a stamp paper in a few days, on the 30th; and he got his Gumastá, Nathu, then to write a draft of a deed of sale, and he said he would next day go to Bhálode and have the house measured and then have a deed of sale made out. Nathu gave the draft to Bháu and Bháu gave it to Dámáji." To meet such a case we have a ruling of a full Bench of the High Court at Calcutta in the case of *Sheikh Rahmatulla* v. *Sheikh Sariutulla* (*e*) where Peacock, C. J. observed :—"Assuming, for the present purpose, that before the deed was executed there was a distinct verbal sale of the property, which between these parties, there being no Statute of Frauds, would have operated as a transfer of title if no deed had been executed, I am of opinion that when the transaction was completed by the execution of a deed, the parties must be considered to have intended that the verbal sale was not to be the operative one or the conclusion of the transaction between them" (p. 79); I entirely concur with the learned Chief Justice and though, in the present case, the deed was not executed, yet the transaction was to be concluded by a regular deed, and therefore I should come to the

(*c*) 4 Calc. W. Rep. Civ. R. 30.
(*d*) 10 Calc. W. Rep. Civ. R. 231.
(*e*) 1 Bengal Law Rep. Full B. R. 58.

1869.

BHA'NDU RA'JA'RA'M v. DA'MA'JI JIVA'JI.

conclusion that the transaction could not be set up against a registered deed and that the Calcutta decision is equally applicable here. But we may decide this case upon a totally different ground; viz. upon the wording of sec. 48 of the Registration Act (XX. of 1866,) which runs thus :—" All instruments duly registered under this Act and relating to any moveable or immoveable property shall take effect against *any* oral agreement or declaration relating to the same property," and here " any oral agreement " may mean an agreement made either previous or subsequent to the registered instrument. Now, there is in this case a registered instrument against which an oral agreement is set up. There is no possession under the registered instrument; but the nature of the possession of the defendant Dámáji cannot be shown without resorting to the oral agreement. Sec. 48 says that an oral agreement shall not prevail, and, if this were not so, the security intended to be afforded by the Registration Act would in most cases be lost. I am, therefore, very much inclined to hold that the oral agreement cannot be set up, and that the possession makes no difference.

GIBBS, J.—I fully concur.

Special Appeal No. 605 *of* 1868.

1869. March 10.

RA'MRA'V KHANDERA'V .....*Appellant.*
GOVIND PA'NDSHET *et al.* .....*Respondents.*

Champerty—Public Policy—Void agreement.

R. entered into an agreement with G., that if a suit, which was then about to be brought by G. for the recovery of certain land, should be decided in favour of G., R. was to pay G. rupees 85, and G. was to make over to R. half the land recovered. R. was to pay G. Rs. 50 in certain proportions which R. was to lose if the suit was not decided in favour of G. G. recovered the land and R. then sued him upon the above agreement.

No issue was taken in the Court of first instance on the question whether the agreement was void for champerty.

An issue was raised on this question by the Appellate Court and (no evidence being taken) was decided in favour of the defendant.

Held in Special Appeal that, as it was not manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the Appellate Court ought not to have held it void.

Semble, that the above agreement was not void on the ground of champerty; at any rate, that it was capable of explanation by a consideration of the surrounding circumstances which the plaintiff should have had an opportunity of giving in evidence.

THIS was a Special Appeal from the decision of A. Bosanquet, Acting District Judge of the Konkán, in Cross Appeals Nos. 516 and 521 of 1867, amending the decree of the Munsif of Panwel.

The case was heard on the 2nd March 1869, before COUCH, C.J., and GIBBS, J.

Shántárám Náráyaṇ for the Appellant.

Pandurán̆g Bálibhadra for the Respondents.

Cur. adv. vult.

The facts of the case fully appear from the following judgment delivered this day by

COUCH, C. J.—This suit was brought on an agreement which, in the judgment of the District Court, is stated to be in substance as follows:—"I mortgaged four fields to Khánderáv and Nánáji, but they refuse to give up the fields to me, and I have to sue them for possession; you and I have agreed that, if the suit be decided in my favour, you are to pay me Rs. 85 and I am to make over to you half the land

1869.

RA'MRA'V KHANDERA'V v. GOVIND PA'NDSHET *et al.*

awarded to me, but if the suit be not decided in my favour you are not to get anything. You are now to pay me Rs. 50. I have received from you Rs. 40 of that sum, and you are to pay me the balance of Rs. 10 on the suit being decided. If the suit be not decided in my favour, you are to lose the above Rs. 50." The Munsif of Panwel decreed that the plaintiff should recover one quarter of the land claimed, on payment of Rs. 47-8-0 to the defendant Govind. Both the parties appealed from this decree to the District Court. The Acting Judge, Mr. A. Bosanquet, in his judgment, after stating the previous proceedings, says. "In appeal No. 516 the defendant, Govind, urges that (1) the agreement sued on is of the nature of champerty, and a claim based upon it is untenable in a Court of Justice; (2) under the agreement the plaintiff was only entitled to one-eighth and not to one-fourth share of the land. In appeal No. 521 the plaintiff urges that the money taken by Pándu (the father of the defendant Govind) from the plaintiff was spent on the redemption of ancestral property, and Rávji took half of it, therefore Pándu's agreement is binding on Rávji. Hence the claim to half of the land has been wrongly dismissed. The 1st issue for decision is whether this action is maintainable. My finding on this issue is in the negative and for the defendant. The agreement by Pándu Dattá to Rámráv Khanderáv, Exhibit No. 4, dated the 23rd of December 1861, on which this suit is based, is in substance as follows (stating it). Before this agreement was made, Rámráv had no interest in the land. Such an agreement as the above is void at law, and, according to the best authorities it is, I believe, void at Equity. The policy of the law on this subject may be considered doubtful by modern jurists, but their views have not, as far as I am aware, been acted upon by Courts of Equity much less by Courts of Law (*See* Norton's Jurisprudence, pages 259 to 262; Smith's Manual of Equity, pages 236 to 238). I amend the Munsif's decree by dismissing the plaintiff's claim entirely with costs." We must remark that the Acting Judge would seem to have thought that he was to decide the case as a Court of Law, and not, as he ought to do, according to Equity and good conscience.

1819.

RA'MRA V KHANDERA'V v. GOVIND PA'NDSHET et al.

Now, the objection that the agreement was void as being of the nature of champerty was not raised by the defence before the Munsif, and no issue upon that was framed by him. The plaintiff had no opportunity of giving evidence in explanation of, or in answer to, this objection; and, unless it is manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the Appellate Court ought not to have held it to be void: *Fischer* v. *Kâmolá Náicker* (a). The Judicial Committee of the Privy Council in their judgment in that case say that the champerty or maintenance which makes an agreement void is something which must have the qualities attributed to champerty or maintenance by the English law; it must be something against good policy and justice; something tending to promote unnecessary litigation; something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary; and that it is necessary to look at the substance of the transaction and not merely the language of the instrument. Possibly, if the question of the validity of the agreement had been raised before the Munsif and the plaintiff had been allowed to show the real nature of the transaction, it would have appeared not to have any of the qualities above mentioned.

In *Harrington* v. *Long* (b) it was held by the Court of Chancery that it is not maintenance to purchase an interest which is the subject of a suit; but if the purchaser give an indemnity against all costs which have been, or may be, incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance. There is no such indemnity in this case, and, except that in the event of the suit being decided against the seller the purchaser is to lose the Rs. 50, the transaction is a simple purchase of an interest which was about to be the subject of a suit. But, if the purchase had been complete at the date of the agreement, and the purchaser had paid the whole of the money, he would lose it, if the suit was decided against the seller,

(a) 8 Moo. Ind. App. 170, & see 187.
(b) 2 Myl. & K. 590.

1869.

RA'MRA'V KHANDERAV v. GOVIND PA'NDSHET *et al.*

and the agreement would not, on that account, be void. A legatee too poor to sue assigned his legacy for less than it was worth to a person who bought it for the purpose of enforcing payment by suit; and the Court of Chancery held that this did not amount to champerty or maintenance, *Tyson* v. *Jackson*; (*c*). It may be that in this case Pándu was too poor to sue without raising money by selling half of the land in this way. Upon the face of the proceedings in the suit it is not clear that the agreement was against morality or public policy, and we are of opinion that the decree of the Appellate Court must be reversed and the suit remanded to it for re-hearing. The costs to follow the final result.

GIBBS, J.—Concurred.

Decree reversed and case remanded.

(*c*) 30 Beav. 384.

March 23.

Special Appeal No. 53 *of* 1869.

LAKSHUMAN RA'MJI.....*Appellant.*
RA'MLA'L valad MAHIPATI .....*Respondent.*

Limitation—Mirásdár—*Land allowed to lie waste by* Mirásdár.

Where a *Mirásdár* left his *mirás* in 1850 without executing a *ráziná má* resigning it, and the *mirás* lay waste until 1855, when the defendant took it up and cultivated it,

It was held that the cause of action of the *mirásdár* arose in 1855, when the *mirás* was taken up by the defendant.

THIS was a Special Appeal from the decision of M. B. Baker, Assistant Judge of the District of Khándesh, in Appeal Suit No. 28 of 1867 reversing the decree of the Munsif of Tengorá.

Lakshuman Rámji Pátil in 1866 sued Rámlál valad Máhipati to obtain possession of his *mirás* land which, in 1850, when he left his village, he had made over to Rámlál on condition that the latter should give up possession to him if he ever returned to the village.

The defendant replied that the field was Government land, that the plaintiff never allowed him to cultivate it, nor did he

(the defendant) agree to give it up to the plaintiff; that the field was waste from 1847 to 1854-55; that the defendant cultivated it in 1855-56, and that the plaintiff's claim was barred by clause 12 of sec. 1 of Act XIV. of 1859.

The Munsif finding that the land was the plaintiff's *mirás* awarded him possession of it. In appeal the Assistant Judge reversed the Munsif's decree, observing:—

"The respondent's *vakil* has urged that, as the appellant has not been in possession for thirty years, he has no title. I do not think this argument is good, for it appears that the respondent simply let the land lie waste in 1850, and that the appellant took it up in 1855 or 1856 from Government and not from the respondent. Hence I consider that S. A. No. 334 of 1867 *Arjuna valad Bhiva* v. *Bhavan valad Nimbaji* (*a*) is on all fours with this case, and that, as the respondent gave up his land by allowing it to lie waste in 1850, the period of limitation is to be reckoned from that time, and that the respondent is not dependent upon prescription for his title. Evidence has been adduced to show that the appellant allowed the respondent to cultivate half the land, but I do not consider that this can be looked upon as such an acknowledgment of the respondent's proprietary right as to warrant the period of limitation being reckoned from the time the appellant allowed the respondent to cultivate, so that, as alleged by the respondent, the cause of action should be considered to have arisen when the appellant refused to let him cultivate any longer."

The case was heard this day before COUCH, C.J., and WARDEN, J.

Nánábhái Haridás for the appellant—The defendant obtained the land from Government in 1855-56, and his adverse possession did not commence until then. The decision of the High Court, quoted by the lower Court, does not apply, as in that case there was a *rázináma* given on surrendering the land, which was not done here.

Vishvanáth Náráyan Mandlik for the Respondent.

(*a*) 4 Bom. H. C. Rep. A. C. J. 133.

1869.

LAKSHUMAN RA'MJI v. RA'MLA'L MAHIPATI.

COUCH, C. J.—It appears from the facts of this case that there was no cause of action until the defendant took possession of the land. The land was lying waste from 1850 to 1855, and the plaintiff could not then have sued any one for it, but he might himself have cultivated it at any time during that period. In the case quoted by the lower Court there was a *rázinámá* given by the original *mirásdár*, the grandfather of the plaintiff, and, therefore, it was held that the right of the plaintiff was affected by the *rázinámá*, and that the cause of action as regarded the plaintiff accrued on the date of that *rázinámá*. In this case nothing occurred till 1855, when the land was taken up by the defendant for cultivation, and, counting the period of limitation from that time, the present claim is not barred. We must, therefore, remand the case to the Appellate Court for retrial on the merits.

WARDEN, J.—Concurred.

Case remanded for retrial.

March 24.

Special Appeal No. 468 *of* 1868.

PA'NDURANG SADA'SHIV .....*Appellant.*
MORO VA'SUDEV .....*Respondent.*

Practice—Special Appeal—Fresh evidence—Dismissal of Special Appeal —Review.

Where an Appellant discovers fresh evidence after a Special Appeal has been admitted, the proper course for him to pursue is to ask to have the Special Appeal dismissed and to apply to the Lower Court for a review.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge at Thána, in Appeal Suit No. 46 of 1867, confirming the decree of the Munsif of Pánwel.

The case was heard before COUCH, C.J., and GIBBS, J.

Vishvanáth Náráyan Mandlik for the Appellant:—In this case fresh evidence has been discovered since the admission of the Special Appeal. I, therefore, apply that the case may be remanded for retrial.

1869.

PANDURANG SADA'SHI'V v. MORO VA'SUDEV.

[COUCH, C. J.—If so, the only course is to dismiss this Special Appeal, leaving you to make an application to the Lower Court for a review of its judgment, without prejudice to your right to prefer another Special Appeal if your application for a review is rejected.]

Nánábhái Haridás for the Respondent:—The Court can remand a case only on those grounds on which a Special Appeal lies to it. Discovery of fresh evidence is no ground for a Special Appeal, and therefore the Court cannot reverse the lower Court's decree and remand the case for retrial.

COUCH, C. J.—In this case no ground for Special Appeal is shown, but, instead of confirming the lower Court's decree, we dismiss the Special Appeal with costs, in order to enable the Special Appellant to apply for a review of the lower Appellate Court's judgment. See *ex parte Bashiyágárulu Náyudu* (*a*).

Special Appeal dismissed.

NOTE *by Reporter.*—In Special Appeal No. 133 of 1864, decided on the 14th of September 1864, it was urged at the hearing of the Special Appeal that the appellant had discovered fresh evidence; but the Court [ARNOULD, FORBES and WARDEN, JJ.] ruled that section 356 of the Code of Civil Procedure did not apply to Special Appeals. An application for a review of the judgment was then made, on the ground that the appellant discovered some further evidence after the Special Appeal had been disposed of, but it was also rejected on the 15th of February 1865.

(*a*) 1 Mad. H. C. Rep. 254.

1869.
March 24.

Special Appeal No. 443 *of* 1868.

BA'BA'JI JIVA'JI .....*Appellant.*
BHA'GIRTHIBA'I widow of WA'MNA'JI MA'N-
KESHVAR .....*Respondent.*

Declaratory decree—Injunction—Suit to restrain widow from adopting.

Where B sued for a decree to declare that he would be heir to the property of the defendant, a Hindú widow, after her death, and for an injunction to restrain her from adopting any other than a member of his family, he being the nearest relative of her husband and the fittest subject for adoption according to the Hindú Law,

It was held that the suit would not lie, as, in the former case, the right was contingent and defeasible by adoption, and, in the latter, the adoption of a stranger was not illegal.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Senior Assistant Judge of the District of Satárá, in Appeal Suit No. 672 of 1867, confirming the decree of Ganesh Amrit, Munsif of Máini.

The plaintiff alleged that he and his kinsman, the defendant's husband, were hereditary Kulkarnis of four villages in the District of Satárá; that by an arrangement between them the plaintiff was to have the management of two of those villages, and the defendant's husband the management of the remaining two, alternately for a period of eight years; that by an agreement entered into between the plaintiff and the defendant herself, after her husband's death, he was to maintain her and become her heir after her death, but that the defendant in violation of that agreement was going to adopt a stranger. He therefore sued to obtain an injunction restraining the defendant from adopting a stranger, and to obtain a declaratory decree to be proclaimed heir after her death.

The Munsif found the agreement not proved and rejected the claim.

The Appellate Court upheld his decision.

The Special Appeal was argued on the 3rd of December 1868, before WARDEN and GIBBS, JJ.

Vishvanáth Náráyan Mandlik for the Appellant:—The plaintiff is entitled to succeed because the defendant, who is a female, cannot alienate or manage by deputy a Kulkarni *watan* which is in the nature of entailed property. The defendant by trying to adopt a stranger will defeat the plaintiff's rights. If she adopts at all she should select a boy from within the family: Steele's Summary, page 50 para. 38, I Mor. Dig. N. S. p. 27 para. 6. [GIBBS, J.—Admitting that the defendant ought to adopt a boy from the family, the question here is whether, if she does not do so, we can grant a prohibitory order. Your case is "Here is a person who is going to do an illegal act which will injure me; prevent it."] The boy in the family has the right to be adopted.

Dhirajlál Mathurádás for the Respondent:—The result of the authorities seems to be that the choice of a boy is a matter of conscience: 1 Strange 84; 2 Strange 98, 99. Mr. Ellis' opinion.

Shántárám Náráyan in reply. A boy in the family has certainly the right of being preferred. If the adoption of a stranger takes place, Hindú Law, by its doctrine of *factum valet*, may prevent its disturbance, but, before such adoption, we can ask the Court to prevent it, if not to enforce the rights of the proper person. The case of a marriage shows that what cannot be undone after it has been done can be prevented beforehand.

Cur. adv. vult.

24th MARCH 1869.—GIBBS, J.—In this case we adjourned the argument as to the adoption in order to consider whether a suit would lie for the injunction sought for in the plaint, and, after a consideration of the cases which are alluded to in Broughton's Edition of the Code of Civil Procedure, we are of opinion that a suit for the injunction now asked for will not lie.

In Special Appeal it has been urged that the Special Appellant can obtain a declaratory decree to be proclaimed heir after the Special Respondent's death, and also for an

1869.
BA'BA'JI JIVA'JI v. BHA'GIRTHI-BA'I.

injunction to prevent the Special Respondent adopting a stranger; but the former is a contingent right, as by Hindú Law the Special Respondent can adopt, and, if she does, the right of Special Appellant to be heir would fail. *Pranputty Korr* v. *Lalla Futteh Bahadoor.** On the 2nd point we decline to grant an injunction, as, even if the widow adopt a stranger, such adoption is not illegal and we cannot therefore bar her so doing. We must therefore confirm the decree of the Court below with costs.

Decree confirmed.

* 8 Sevestre's Rep. p. 277.

Special Appeal No. 19 *of* 1869.

April 5.

BA'PUJI BALVANT .....*Appellant.*
RAGHUNA'TH VITHAL .....*Respondent.*

Jurisdiction—Boundaries—Encroachment—Act (Bombay) II. of 1866.

Where boundaries are removed or destroyed and when new ones are to be fixed, or where a question arises where boundaries run, the case falls under sec. III. of Bombay Act II. of 1866; but where the question between the parties is whether there has been an encroachment by the defendant on the lands of the plaintiff the Civil Courts have jurisdiction.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge at Thaṇá, in Appeal Suit No. 45 of 1867, reversing the decree of the Munsif of Máhád.

Bapuji Balvant in his plaint alleged that in the village of Vile Tarf Nizámpur in the Rájpuri Táluká, certain land (survey No. 371), measuring in all six acres and thirty chains, was entered in his name; that out of this land in the eastern direction four acres and two chains belonged to him by proprietary right, for which he paid the Government assessment, but that the defendant Raghunáth Viṭhál, in July 1865, took possession of the said land and obstructed the plaintiff's management. He therefore sued for possession of it.

The defendant answered that the land in dispute belonged to him by propriotary right and had been in his management as proprietor for more than twelve years; that there was a plot of land of six acres and thirty chains lying to the west

and north of the land in dispute which was entered in the plaintiff's name; and that the field to the east of this land of the plaintiff (including the disputed land) also of six acres and thirty chains was entered in his name, and that this land was managed by him as before.

The Munsif held that the land enjoyed by the plaintiff and defendant, including the land mentioned in the plaint, was their ancestral property; that at the time of the survey half of the land was entered in the name of each, but that the defendant managed two *bighás*, eighteen *páṇḍs*, and fifteen *kithás* more than his half, and that therefore this excess should be restored to the plaintiff. In appeal the Assistant Judge recorded the following judgment:—

"It seems to me clear that it is a boundary dispute. There is no dispute as to the fact, that each party has a certain portion of the field. The only question raised is the extent of the portion belonging to each, or in other words the position of the boundary. I, therefore, hold that under Bombay Act II. of 1866 the claim is not within the jurisdiction of this Court or of the Munsif's Court: *Náráyaṇ* v. *Dámle* vs. *Dhoṇḍu Dámodhár*." (*a*)

The case was heard before COUCH, C.J., and GIBBS, J.

Shántárám Náráyaṇ for the Appellant—The Assistant Judge was wrong in holding that he had no jurisdiction in this case. The suit is not one to determine boundaries but is an ordinary ejectment suit. Even if the Court has to determine the boundaries, still its jurisdiction is not ousted. Section 3 of (Bombay) Act II. of 1866 provides that disputes regarding boundaries shall be dealt with in accordance with the provisions of (Bombay) Act I. of 1865. Under that Act, when the boundaries are once fixed, the power of the survey officers is at an end, as will appear from secs. 12, 13, and 14 of the Act, and questions regarding them are then to be decided by the Civil Courts. The Collector, by section 31 of Reg. XVII. of 1827 had power to decide disputes regarding boundaries; but this section was repealed by (Bombay) Act II. of 1866, so that the Collector's Court is closed, and the

(*a*) 1 Bom. H. C. Rep., A. C. J. 167.

1869.
BA'PUJI BALVANT v. RAGHUNA'TH VITHAL.

Survey Court is also closed after the measurement and survey are concluded, and, therefore, the Civil Court alone has jurisdiction in such cases, not perhaps to declare what ought to be the boundaries, but to declare the parties' rights according to the boundaries fixed by the Survey.

Bahiravnâth Mangesh, for the Respondent.—The defendants held the land ever since the survey, when the boundaries were marked out, and the boundaries, so fixed once, cannot be disturbed otherwise than under the provisions of the Act.

COUCH, C. J.—The suit is to recover a piece of land in the possession of the defendant, and the question is whether there is any encroachment, for, if so, the Civil Courts will have jurisdiction. The case quoted by the Assistant Judge (*b*) does not apply: In that case the complaint was that the defendant had disturbed the boundaries; and the suit had been instituted before the Act of 1866. This Court therefore decided that the appeal lay to the Collector and not to the Judge. This decision has misled the lower Court: it does not appear to have occurred to it that the suit in that case was filed before (Bombay) Act II. of 1866 came into operation, and that the present suit was of a different nature. It is not easy to say what is a boundary dispute. It seems to me, however, that when boundaries are removed or destroyed and new ones are to be fixed, or when the question is where the boundaries run, the case would fall under sec. 3 of (Bombay) Act II. of 1866. In the present case, the Munsif has found an encroachment on the part of the defendant. We must, therefore, remand the case to the Appellate Court for retrial on the merits.

GIBBS, J.—I quite concur. The question being whether the defendant has committed an encroachment, this case is within the cognizance of the Civil Courts. Should there be any dispute after the marks have been fixed, the Collector sets the boundaries right and re-erects the old ones, and this is taken out of the hands of the Civil Courts, and very properly so, as no civil rights of the parties are involved in the matter.

Decree reversed and case remanded.

(*b*) 1 Bom. H. C. Rep. A. C. J. 167.

Special Appeal No. 12 *of* 1869. 1869. April 5.

NILOWA' .....*Appellant.*
FAKIRA'PPA' .....*Respondent.*

Jurisdiction—Special Appeal—Political Agent.

A Special Appeal lies from the decision of the Political Agent of the Southern Máratha Country passed in Regular Appeal.

THIS was a Special Appeal from the decision of G. A. Anderson, Political Agent, Southern Maráthá Country, reversing the decision of the Civil Court of the Sardeshgat of Navalgund.

The plaintiff, Nilowá, as guardian of her sons, sued the defendant Fakiráppá to recover possession of certain lands, alleging that the same had fallen to her share at a division of the family property made under a deed of partition dated 26th January 1866. The defendant denied the execution of the deed and contended that the plaintiff's husband had separated 22 years before.

The Desái of Navalgund, who exercised civil jurisdiction under Reg. XIII. of 1830, awarded the claim; but, on appeal, his decision was reversed by the Political Agent, on the ground that the deed of partition was not registered as required by section 13 of Act XVI. of 1864, and that therefore it was not admissible in evidence.

The case was heard this day before COUCH, C. J., and GIBBS, J.

Shántárám Náráyan for the Appellant.

Ganpatráv Bháskar for the Respondent.

Ganpatráv Bháskar—No Special Appeal lies against the decision of a Political Agent: section 5 of Reg. XIII. of 1830 provided for Special Appeals being received under the Rules contained in Chap. XXII. of Reg. IV. of 1827, but the latter is now repealed, and, therefore, there is no provision under which a Special Appeal can lie in such cases.

1869.

NILOWA' v. FAKIRA'PPA'.

Shántárám Náráyaṇ.—The concluding part of sec. 384 of the Code of Civil Procedure is quite clear on the point; there is a case in point. A Regular Appeal No. 10 of 1863 was allowed against the decision of the Political Agent at Kolápur.

COUCH, C. J.—There is no doubt that a Special Appeal lies in this case, and we must therefore hear the Appeal.

Shántárám Náráyaṇ.—The Agent was wrong in holding that the deed of partition required registration under Act XVI. of 1864, because, as the place was a non-Regulation District, the law of Registration was required to be specially extended to it. Act XVI. of 1864, section 71.

COUCH, C. J.—Navalgund having been brought under the Regulations by Reg. VII. of 1830, the law of Registration as contained in Reg. IX. of 1827, as well as the new Registration Act of 1864, should be considered to be in force there, and the Political Agent has rightly held that the deed of partition being unregistered is invalid. We must therefore confirm his decision with costs.

Decree confirmed.

1869.
April 7.

Special Appeal No. 473 of 1868.

A'BU'BEKAR bin HAGA'DA' HAJISA'BA' ....*Appellant.*
MA'IBIBI' and SIDI' SA'HÉB.....*Respondents.*

Muhammadan Law—Gift with condition—Award of Panchâyat.

Máibibi and her son, Sidi, departing on a journey, made a conditional gift of their property to A'búbekar.

On their return, A'búbekar, under the award of a *panchâyat*, restored their property—but, by the instrument re-conveying it, their estate was limited to a life interest, and they were restrained from alienating it.

The lower Courts held this instrument to be a deed of gift, and that the conditions attached to the gift were void by Muhammadan Law.

Held, on Special Appeal, that the lower Courts were wrong in so treating it, as it was in fact a compromise, the terms of which should be carried out and Máibibi and her son should be restrained from wasting or alienating the property.

THIS was a Special Appeal from the decision of R. West, Acting Judge of Cánárá, in Appeal Suit No. 83 of 1867, confirming the decree of the Munsif of Honor.

The facts of the case are briefly these—The defendants Máibibi and her son Sidí, being about to set out on a pilgrimage to Mecca, made a gift (exhibit No. 2) to the plaintiff A'búbekar of their property. The deed of gift was executed only by the donors, and the conditions of it were, that on their return the plaintiff should deal with the property with their consent, and that, in the event of their deaths, he should celebrate their funerals. The defendants set out for Mecca, but, after going as far as Bombay, they returned, and the plaintiff restored the property to them on the award of a *panchâyat*. The re-conveyance to the defendants was effected by a writing (exhibit No. 3) executed by both the parties, and it stated that the defendants had merely a life interest in the property, and that they should not alienate it. As the defendants were committing waste, the plaintiff sought for a decree affirming his title in succession to the defendant, Sidí, and limiting the defendants' power of dealing with it to the term of Sidí's life.

Máibibi did not appear, and the defence of Sidí was that he had intended merely to place the plaintiff in possession of the property as his agent until his return.

1869.

A'BU'BEKAR HAGA'DA' HAJISA'BA' v. MA'HIBI' and SIDI' SA'HEB.

The Munsif rejected the plaintiff's claim and his decision was confirmed by the Judge who delivered the following judgment:—

"The issues for decision are:—

"1. Was there a valid gift duly made to A'búbekar?

"2. Is he entitled upon the document No. 3 to a declaration of his title to the property, and of Sidí's and Máibibí's disability to deal with it to any, and to what extent, during their lives?

"On the first issue I find that the document No. 2, taken with the delivery of the property, constituted a valid gift to A'búbekar. The proceedings sent for by the Munsif from the Revenue Department, and to which the Vakíl of the defendant, Sidí, though repeatedly called on, did not object, contain a sufficient admission of the transaction by Sidí, and there appears to be no reason to question it. What the Munsif says of a condition vitiating a gift does not apply here. A gift by the Muhammadan Law cannot be suspended on a condition, and here there was an actual delivery of the property to A'búbekar, who appears to have been in possession for about a year before Sidí, and Máibibi returned. Whether Sidí could have enforced the condition is not of importance in this case. It is clear that he had parted with the property.

"As to the second issue the evidence of the two Kázis Nos. 51 and 52 is in favor of the appellant. But the case given at page 509 of Baillie's Muhammadan Law supports the conclusion of the Munsif. It is there said that if a house be given with the words 'when thou art dead it reverts to me,' the condition is void. It has been contended that this is a case of a contract, but, the property having passed to A'búbekar, it must be regarded as a gift, and the mere acceptance of the condition amounts to no more than would be implied in receiving the gift offered with a condition. 'A gift,' it is said, 'cannot be limited in respect of time' and the effect of the agreement No. 3 is so to limit it. I must find on the second issue for the respondent, and confirm the Munsif's decree with costs.

1869.

A'BU'BEKAR HAGA'DA' HAJISABA' v. MA'IBIBI and SIDI' SA'HEB.

"15th AUGUST 1868.—A'búbekar applies for a review of judgment on the grounds, (1) that the proper sense of the passage at page 509 of Baillie's Muhammadan Law is that an illegal condition (only) is void in limitation of a gift; and (2) that the decision is opposed to page 51 para. 13 of Macnaghten's Muhammadan Law.

"As to the first point, I cannot see that there has been any misconstruction. As to the second, the passage applies to a gift not yet carried out. One in which possession has been delivered cannot be revoked. I therefore reject this application."

The case was heard this day before COUCH, C. J., and NEWTON, J.

Macpherson (with him *Shántárám Náráyaṇ*) for the appellant:—The second gift (No. 3) was not a voluntary gift, as it was made under the award of a *panchâyat* and was like a decree or order of Court, and, therefore, it should be carried out according to its terms.

The Respondents were not represented.

COUCH, C. J.—Seeing the nature of the transaction under the exhibit No. 3, we are of opinion that the Judge was wrong in treating it as a gift. It was merely a compromise, under which possession was to be given to Sidí for his life, and the arrangement might well be made without an actual gift to the defendants. It would not be equitable for Sidí to take the benefit of the Muhammadan Law and not to be bound by the terms of his agreement. We have here before us sufficient materials to pass a proper decree. We therefore reverse the decrees of the Appellate Court and of the Munsif, and decree that the plaintiff is entitled to the property claimed in the plaint on the death of the defendant Sidí, and order that the defendant Sidí be restrained from alienating or wasting the property during his lifetime.

NEWTON, J.—Concurred.

New decree made.

1869.
April 21.

Special Appeal No. 589 *of* 1868.

NA'RA'YAN bin RA'GHOJI' .....*Appellant.*
BHOLA'GI'R GURU' MA'NGIR .....*Respondent.*

Special Appeal No. 597 *of* 1868.

HORMASJI' SORA'BJI' and RA'MJI' bin KEROJI'.....*Appellants.*
BHOLA'GIR' GURU' MA'NGIR .....*Respondent.*

Special Appeal No. 602 *of* 1868.

BHOLA'GI'R GURU' MA'NGIR .....*Appellant.*
HORMASJI' SORA'BJI'.....*Respondent.*

Building erected upon another's land—Right of builder to remove—Equity.

Where H., knowing that B. claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow upon it, which B. did not interfere to prevent.

It was held that the English rule of Equity, which under such circumstances would allow B. to recover the land with the bungalow upon it, ought not to be applied in India, but that H. should be allowed to remove the bungalow he had erected.

THESE were cross Special Appeals from the decision of N. Daniel, Assistant Judge at Puṇá, in Appeals No. 638 of 1865 and No. 13 of 1866, amending the decree of the Ṣadr Amín of Puṇá.

In 1863, prior to the 1st of May Bholágír Gurú Mángir purchased from Rámji bin Kerojí certain lands in the Puṇá District (Survey Nos. 92, 93, 94, and 96). The lands were at that time held in mortgage by one Náráyaṇ bin Rághoji, and it was part of the terms of the purchase that Bholágír should pay off Náráyaṇ's mortgage ; no special time was, however, fixed within which he was to do so. He did not then pay off the mortgage and enter into possession, but he duly registered his deed of purchase on the 8th of June 1863.

On the 1st May 1863, Hormasjí Sorábjí agreed to purchase from Rámji bin Keroji, 30 guṇthás of Survey No. 92, and 31

gunthás of Survey No. 93. He then, on the 26th May, published a notice of his contract in the "*Vruta Prakásh*" requiring any person having claims against the property to come forward. On the 20th of August following, he completed the purchase, and registered his purchase deed on the 23rd February 1865.

At the time of his purchase Hormasjí knew that Bholágír had a claim upon the land, as Hormasjís purchase deed mentioned the fact of the sale to Bholágír, but stated that Bholágír had failed to fulfil his part of the contract in not redeeming the mortgage of Náráyaṇ, such redemption forming part of the consideration.

After the completion of his purchase, Hormasjí entered into possession and commenced to build an expensive bungalow upon the land.

These circumstances were known to Bholágír. Two suits were now filed by Bholágír, one, about sixteen months after the purchase of Hormasjí, against Náráyaṇ bin Rághoji, the mortgagee, to redeem the mortgage, in which suit Hormasjí was made a defendant. The other against Rámjí bin Keroji to recover part of the land in his possession.

The Ṣadr Amín, Krishṇaráv Sadáshiv, awarded that the plaintiff, Bholágír, should pay Rs. 175 to the defendant, Náráyaṇ, and recover possession of the Survey Nos. 91 and 96, and threw out the plaintiff's claim in respect to Nos. 92 and 93, on the ground that he had slept over his rights.

The issues raised in appeal were—

1. Is the deed of sale to Bholágír valid?

2. If so, can it be enforced against the right of proprietorship pleaded by the respondent, Hormasjí, and on what terms?

The judge found that the deed was valid.

The following is an extract from his judgment on the second issue:—

"With Hormasjí there are two points especially to notice; first, he was aware of Bholágír's claim on the property, and

1869.

NA'RA YAN RA'GHOJI' v. BHOLA'GI'R GURU' MA'NGIR

HORMASJI' SORA'BJI' et al. v. BHOLA'GI'R GURU' MA'NGIR

BHOLA'GI'R GURU' MA'NGIR v. HORMASJI' SORA'BJI'.

the means he took to secure his own right were not the best means within his power. A general notification in an obscure vernacular print is of no value when he had it in his power to communicate directly with Bholágír, and so to force on Bholágír the responsibility of any delay in establishing his right. The other point is that there is a strong presumption of Hormasjí having made a great portion of his outlay on the land subsequent to the filing of the suit.

"On the other hand, beyond the filing of the suit, Bholágír does not appear to have hindered Hormasjí by injunction or otherwise. This suit was filed sixteen months after the execution of Hormasjí's deed, and Hormasjí may have been led to believe that Bholágír had no real lien on the property. I think it clear that Bholágír slept for some period over his rights, and that he only put forward his claim when circumstances had turned much in his favour.

"A decree in Equity, while giving him all that he is entitled to at law, would debar him from any benefit which he might hope to have acquired by his procrastination in asserting his own rights.

"I rule that Bholágír can recover possession of the land, and I award a decree to that effect, in amendment of the decree of the lower Court. The recovery of possession is subject to the following reservation: that Hormasjí at his option may remove his buildings and restore the property to the condition in which he found it when he assumed possession, or that he may recover from Bholágír the value of the permanent buildings and improvements on the land according to the valuation proved either at the present date or at the date of the enforcement of recovery (whether by suit or otherwise), whichever valuation may be the lower.

"In the case of Náráyaṇ, I consider the award of the lower Court sound as to the payment of the mortgage, and I confirm the decree against him."

White (with him *Dhirajlál Mathurádás* and *Pánḍurang Balibhadra*) for the Appellant, and *Shántárám Náráyaṇ* for the Respondent, in S. A. No. 597 of 1868.

1869.

NA'RA'YAN RA'GHOJI' v. BHOLA'GI'R GURU' MA'NGIR

HORMASJI' SORA'BJI', *et al.* v. BHOLA'GI'R GURU' MA'NGIR.

BHOLA'GI'R GURU' MA'NGIR v. HORMASJI SORA'BJI'

Dhirajlál and *Pándurang* for the Appellant, and *Shántárám* for the Respondent, in S. A. No. 589 of 1868.

Shántárám for the Appellant, and *White* (with him *Dhirajlál*) for the Respondent, in S. A. No. 602 of 1868.

The case came on for argument on the 17th of March 1869, when it was adjourned that Bholágír might be consulted as to whether he wished to take the bungalow at a valuation.

March 31st—*Shántárám Náráyan* stated that Bholágír did not wish to purchase the bungalow, but was willing to sell the land; but that Hormasjí would not agree to the amount claimed by Bholágír for it.

COUCH, C. J.—We cannot force the owner of the land to take the building on it at a valuation.

White.—Story, in his work upon Equity Jurisprudence, section 388, says, "if a man, supposing he has an absolute title to an estate, should build upon the land, with the knowledge of the real owner, who should stand by, and suffer the erections to proceed, without giving notice of his claim, he would not be permitted to avail himself of such improvements, without paying a full compensation therefor; for in conscience, he was bound to disclose the defect of title to the builder—Nay, a Court of Equity might, under circumstances, go further, and oblige the real owner to permit the person making such improvements on the ground to enjoy it quietly and without disturbance." [COUCH, C. J.—That does not go to the extent of holding that the owner should be obliged to pay for the buildings. What is laid down is that the owner would not be permitted to *avail himself* of such buildings, that is, they should be allowed to be removed.]

Shántárám Náráyan.—It is not shown here that the owner, Bholágír, led Hormasji to believe that he was safe in building upon the land. If he was led to believe so, the doctrine to be followed would have been the one illustrated in *Ánandrám* v. *Rávji* (*a*). The doctrine quoted from Story does not

(*a*) 2. Bom. H. C. Rep. 214, 2nd Ed

1869.

NA'RA'YAN RA'GHOJI' v. BHOLA'G'IR' GURU' MA'NGIR

HORMASJI' SORA'BJI'. *et al.* v. BHOLA'GI'R GURU' MA'NGIR.

BHOLA'GI R GURU' MA'NGIR v. HORMASJI' SORA'BJI'.

April 12.

apply, because there the person building was induced to believe that he was safe in doing so.

Cur. adv. vult.

COUCH, C. J.—The question in this case is whether the decree rightly gives an option to Hormasjí to remove his buildings or to recover from Bholágír their value according to the valuation proved either at the date of the decree or "at the date of the enforcement of recovery (whether by suit or otherwise) whichever valuation may be the lower." Mr. White has quoted a passage from Story on Equity Jurisprudence to show that, where an owner stands by, and, seeing a person building upon his land, raises no objection, he must suffer. There is a case of *Cawdor* v. *Lewis* (*b*) on this point which was not quoted at the hearing, and there are others to the same effect; but they do not apply here, because in the conveyance (No. 16) to Hormasjí from Rámjí it is clearly recited that "the said land and the land now sold to you were bargained to be given (sold) to the worshipful Bholágír, and a deed of purchase was passed, but, though about five or six years have passed, he has not paid the mortgagee (and) settled the matter in any way. The papers are lying with him in the same state. I therefore have sold the land to you."

Thus, Hormasjí in this case was not building upon the land without the knowledge of Bholágír's claim, but was possessed of all the information which Bholágír himself could have given him. In the case of *Ramsden* v. *Dyson* (*c*) Lord Cranworth observed:—"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain

(*b*) 1 Y. & Coll. 127 (*c*) Law Rep. 1 H. L. 1 App. 129

wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an Equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For, if a stranger builds on my land knowing it to be mine, there is no principle of Equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights" (p. 140.)

In the case of *Master of Clare Hall* v. *Harding* (*d*) the Vice-Chancellor said, "if a party in the possession of an estate, knowing that another claims the property, will, with his eyes open, spend money upon it, I know of no case in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made." (p. 296). Here Hormasjí knew that Bholágír claimed the land and, knowing this, expended the money.

The circumstances of this case, therefore, are such that it does not come within the rule relied upon by Mr. White. Hormasjí took the risk, and, as he was informed of Bholágír's claim, it was not necessary for the latter to give a notice. We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, *viz.*, that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India, that the party so building on another's land should be allowed to remove the materials. We must, therefore, modify the decree of the Appellate Court by striking out the reservation in favour of Hormasjí, and substituting for it that he shall be at liberty forthwith to commence to remove his buildings and to re-

(*d*) 6 Hare 273

1869.

NA'RA'YAN RA'GHOJI' v. BHOLA'GI'R' GURU' MA'NGIR.

store the property to the condition in which it was when he took possession; the same to be completed within one year from the date of this decree. Costs of Special Appeal, No. 589 of 1868, on Náráyaṇ bin Rághoji, and those of Special Appeals Nos. 597 and 602 of 1868, on Hormasjí.

GIBBS, J.—Concurred

Decree modified.

April 13

Special Appeal No. 64 of 1869.

MALHA'RI valad RA'GHOJI.....*Appellant.*
TUKA'RA'M valad DA'RKOJI .....*Respondent.*

Limitation—Gatkuli *land*—*Non-payment of assessment.*

Where a *gatkuli* tenant omitted to pay the assessment on his *gatkuli* land, and the defendant obtained possession of it. The lower Court decided that the *gatkuli* tenant, having omitted to pay his assessment, had lost all title to his land.

On Special Appeal the High Court remanded the case for the lower Court to inquire whether the Government had taken action in the matter by putting the defendant in possession; as, if not, he would be merely a trespasser, and the *gatkuli* tenant would be entitled to recover.

THIS was a Special Appeal from the decision of F. Lloyd, Judge of the District of Puṇá, in Appeal Suit No. 496 of 1866, reversing the decree of the Munsif of Khed.

Malhári valad Rághoji sued to recover from Tukárám valad Dárkoji possession of a field, alleging that it had been registered in his (Malhári's) name for thirty-two years, and that he had during that time paid assessment on it; that about eight years ago he had let it under a verbal agreement for five years to the defendant who now refused to give it up.

Tukárám's defence was that the land was *gatkuli* and that the plaintiff had no right to it; that the plaintiff was unable to cultivate it and had relinquished it fifteen years ago; that, with the consent of the Pátíl and Kulkarni, one Sahatu cultivated it for two or three years; that he had also resigned it, and that then the Government placed him (Tukárám) in possession, and that he had since paid the assessment.

The Munsif awarded the claim, but his decision was reversed by the Judge who delivered the following judgment:—

"The issues in this case are:—Is the lease proved? Has Malhári a title to the land? Has Tukárám held adverse possession for more than twelve years? Is Malhári entitled to possession?

"I find that the lease is not proved. The land is admitted to be *gatkuli*, that is, land to which no one can claim a proprietary right, and the continued possession of which is conditional on due payment of the assessment; consequently, Malhári having ceased to pay the assessment has no title to it.

"Tukárám has not held possession for more than twelve years.

"On the last issue I find that, as the land is *gatkuli*, and hence Malhári has no title to it, he having ceased to pay the assessment, he is not now entiled to be placed in possession; and I, therefore, reverse the decree of the lower Court and throw out the claim. Costs on Malhári."

The case was heard by COUCH, C. J., and GIBBS, J.

Dhirajlál Mathurádás and *Shivshankar Govindrám* for the Appellant.

Nánábhái Haridás for the Respondent.

COUCH, C. J.—In this case the plaintiff was the recognized occupier of the land, and, though the land was still in his name in the Collector's books, he ceased to pay the assessment six years before the suit. The defendant was in possession; but it is not found whether the Government put him in or whether he was merely a wrong-doer. If the Government has not put him in and has taken no action upon the non-payment of the assessment by the plaintiff, the latter will have a good title against the defendant, because, until his title is divested by the act of the Government, he retains his right. We must, therefore, reverse the decree and remand the case, in order that the Appellate Court may try and determine,

1869.
MALHA'RI RA'GHOJI v. TUKA'RAM DA'RKOJI.

whether the defendant Tukárám had been put into possession by the Collector upon non-payment of the assessment by the plaintiff, Malhári, or upon a *rázinámá*. If this question be not found in the affirmative, the lower Court should pass a decree in favour of the plaintiff Malhári.

GIBBS, J.— I quite concur.

Decree reversed and case remanded.

April 14.

Special Appeal No. 65 *of* 1869.

A'PPA' valad KA'SHINA'TH .....*Appellant.*
VITHOBA' valad TUKA'RA'M.....*Respondent.*

Insufficiency of evidence taken by lower Court—Course to be pursued on appeal—Civ. Proc. Code, sec. 355.

Where a Munsif, without framing issues or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant and upon inspection of a document that was upon the record of a former suit ; but the judge, on appeal, reversed the decree of the Munsif on account of the insufficiency of evidence, the document, in his opinion, not being admissible.

It was held that the judge ought not to have reversed the Munsif's decree without first exercising his power of taking fresh evidence under sec. 355 of the Code of Civil Procedure.

THIS was a Special Appeal from the decision of S. N. Tagore, Acting Assistant Judge at Ahmednagar, in Appeal Suit No. 356 of 1868, reversing the decree of the Munsif of Kadá.

The plaintiff A'ppá sued the defendant Vithobá to recover possession of certain premises alleged to have been let to him.

The defendant denied that the premises had been let to him by the plaintiff, and pleaded occupation for ten or twelve years.

The Munsif, Náráyan Govind Apte, after adjourning the case several times for the settlement of issues, sent for the papers in another suit (No. 2239 of 1861) from the Judge's

Court, and on receipt of them decided the case in the plaintiff's favour without recording any issues, as he considered that the defendant's admission and the rent note in the other suit were sufficient and rendered further enquiry unnecessary.

In appeal, the Assistant Judge reversed the decree on the ground that the former suit in which the admission was alleged to have been made was not between the same parties, that the rent note relied upon was not stamped, and that there was no other evidence, oral or written, to prove the plaintiff's title.

The case was heard this day before COUCH, C. J., and NEWTON, J.

Dhirajlál Mathurádás for the Appellant:—Under the circumstances of the case, the Assistant Judge was wrong in reversing the Munsif's decree without giving the plaintiff an opportunity of producing all his evidence.

Shántárám Náráyan for the Respondent.

COUCH, C. J.—The course which the Munsif took in this case in deciding in the plaintiff's favour without fixing the issues prevented the plaintiff from giving evidence, and, had the plaintiff asked that his evidence might be taken, the Munsif would have refused the application. In appeal, the Assistant Judge found that the evidence upon which the Munsif decided was not sufficient to justify the decision. He should, therefore, have given the plaintiff an opportunity to produce his evidence; because, until the Assistant Judge pronounced his opinion, the plaintiff could not know that other evidence was required and would not tender it. This was not a disposal of the case by the Munsif on a preliminary point, excluding any evidence of fact, and, therefore, section 351 of the Code of Civil Procedure does not apply to it. It would not be right for the Appellate Court in such a case to remand the suit for retrial, since section 352 of the Code limits the power of remand to cases falling under section 351 only. The course which the Assistant Judge ought to have adopted was to exercise the power given by section

1869.

A'PPA' KA'SHINA'TH v. VITHOBA' TUKA'RA'M.

355 of the Code. This section applies not merely to a case where the lower Court has refused to take evidence, but also where there is a substantial cause for taking further evidence, and here there was a substantial cause, not only to justify but to require the admission of additional evidence by the Assistant Judge. We, therefore, reverse the decree of the Appellate Court and remand the case to be dealt with in accordance with this judgment.

NEWTON, J.—Concurred.

Case remanded.

April 19.

Special Appeal No. 82 of 1869.

VITHAL MAHA'DEV *et al.* .....*Appellants.*
DA'UD valad MUHAMMAD HUSEN *et al* .....*Respondents.*

Ancient Documents—Proof—Thirty years' rule.

With regard to the proof of ancient documents the proper rule is, that if they are more than thirty years old they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use and are free from suspicion of dishonesty.

Application of this rule considered.

Hari Dhangar v. *Biru Dasru* (5 Bom. H. C. Rep. A. C. J. 135) commented upon, and error in note thereto pointed out.

The rule, that if the owner of different estates mortgage them to one person separately for distinct debts or successively to secure the same debt the mortgagee may insist that one security shall not be redeemed alone, applied to a Muhammadan mortgage.

In mortgage transactions in which the mortgage contracts have been entered into before Act XXVIII. of 1855 came into operation and to which Reg. V. of 1827 secs. 11 and 12 applies, and in which an account of principal and interest on the one side and of rents and profits on the other side is not directed, the arrears of interest must be limited to six years.

THIS was a Special Appeal from the decision of R. F. Mactier, Judge of the District of Sattárá, in Appeal Suit No. 428 of 1867, amending the decree of the Principal Sadr Amín of Sattárá.

1869.

VITHAL MAHA'DEV *et al.* v. DA,UD MUHAMMAD HUSEN *et al.*

The case was heard this day before COUCH, C. J., and NEWTON, J.

Shántárám Náráyaṇ for the Appellants.

Vishvanáth Náráyaṇ Mandlik for the Respondents.

The facts of the case appear sufficiently from the following judgment delivered by

COUCH, C. J.—In this case the three plaintiffs, one of them being the son of one brother and the others grandsons of another brother, sued to redeem a mortgage upon certain property which they alleged was in the possession of the defendants. The plaintiffs stated that they did not know the amount of the mortgage, and prayed that the defendants might be required to render an account and to give up the land on payment of the amount that might be found due. It is clear, though there is no finding on the point, that the defendants had been in possession for such a length of time that the plaintiffs would have been barred if they had not sued as mortgagors. The defendants set up two mortgages (Exhibits Nos. 6 and 7). No. 6 purported to have been executed by the father of the first plaintiff, and No. 7 had been executed by the first plaintiff himself. No. 7 was admitted by the plaintiffs, but No. 6 was disputed and the plaintiffs contended that it was not executed at all; or that, if it was executed, it did not apply to the land in dispute.

The Munsif decreed that the land should be redeemed on payment of the amount due under No. 7. On appeal, by the defendants, the Judge laid down the point,—"what is the amount of the defendant's mortgage claim on No. 6, and is it proved?" and he found that No. 6 was proved. The grounds of his finding were, that it was much more than thirty years old; that, having been produced by the representatives of the mortgagee, it came from proper custody, and that he saw no reason to believe that it was either concocted or satisfied. This finding is objected to and in support of the objection the case of *Hari Dhangar* v. *Biru Dasru* (*a*) is cited.

(*a*) 5 Bom. H. C. Rep. A. C. J. 135.

1869.

VITHAL MAHA'DEV *et al.* *v.* DA'UD MUHAMMAD HUSEN *et al.*

In that case the Assistant Judge, having held that a document which came from proper custody and which was more than thirty years old proved itself, the Division Court held that the decree was erroneous, and the decision in Special Appeal, No. 966 of 1864, was referred to as laying down the rule as to the proof of ancient documents. The rule laid down in Special Appeal No. 966 of 1864 was, that documents more than thirty years old need not be proved, provided that they have been so acted upon, or brought from such a place, as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. That I consider to be the proper rule on the subject; but I cannot concur in the application of it by the Division Court in the case quoted. In Special Appeal, No. 966 of 1864, the District Judge, although the document was more than thirty years old, thought from the circumstances of the case that there was suspicion attaching to it, and he therefore found that it was not proved. In Special Appeal it was urged that, as the document was thirty years old and came from proper custody, the Judge was bound to find it proved and to give effect to it. We, however, held that he was not bound to do so if he thought it was not free from suspicion. Another case, Special Appeal No. 229 of 1868, is referred to in a note to the reported case, in which there were three documents more than thirty years old, but the Judge required the same proof of them as if they had been modern documents, and we held that he was wrong in doing so. The note referred to which represents me as having followed the ruling in the case of *Hari Dhangar* v. *Biru Dasru* (*supra*) is not correct. In both the cases in which I sat I applied the rule, but not in the manner in which it was applied in the case of *Hari Dhangar* v. *Biru Dasru*. In the first case, I held that the Judge was not bound to give effect to the document, merely because it was more than thirty years old and came from what might be considered proper custody. In the other, I held that the Judge ought to have had regard to the rule of law as to the proof of ancient documents, and not to have required them to be proved in the

ordinary way, whereas in the case of *Hari Dhangar* v. *Biru Dasru* (*supra*) it does not appear that the Judge entertained any suspicion of the genuineness of the document.

In the case now before us the Judge finds the document No. 6 to be more than thirty years old and to have come from proper custody; and, as there is no expression of distrust respecting it, it should be considered to be proved.

The Judge holds that it ought not to have effect in favor of the appellants, the mortgagees, because it is not shewn that it applied to the forty bighás of land in dispute. We, however, consider that he was not justified in requiring further proof on this point, since the second mortgage, No. 7, contains words which show that there had been a previous mortgage; viz.,"our land is with you for liquidation of debt." And, as there is no evidence of any other previous mortgage than that shown by Exhibit No. 6, the Judge might fairly have held it to be the one referred to. This is a question of fact, and it might be that on this we could not interfere with his decision, but in point of law he was wrong in his finding. No. 7, as I have just observed, showed that there was a previous mortgage debt and, according to the doctrine of Equity, "if the owner of different estates mortgage them to one person, separately, for distinct debts, or successively, to secure the same debt, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone; upon the principle that redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee, and redeem him entirely—not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other." (*b*).

Here the mortgagors seek to redeem No. 7, and it is found that there is another mortgage between the same parties, though possibly not of the same land; the Court will not therefore assist the plaintiffs who seek to redeem, unless they are ready to do equity by paying off all the mortgages.

(*b*) Fisher on Mortgage, 2nd Ed. Vol. II p. 678.

1869.

VITHAL MAHA'DEV *et al.* *v.* DA'UD MUHAMMAD HUSEN *et al.*

It is true that the bond, No. 6, was not executed by more than one of the members of the family, but the plaintiffs, though Muhammadans, have sued jointly as if they were members of a Hindú family and appear to have followed the Hindú custom, and treated the property as joint family property. The second and third plaintiffs cannot now be allowed to say that the maker of the bond, No. 6, was not competent to bind them. He was in all probability acting as the manager of the family.

As regards interest, the lower Court has ruled that no more than six years' interest should be allowed in this case. Against this, Mr. Shántárám has cited the decision of the present Bench in *Bahirji* v. *Bálkrishna* (Special Appeal No. 638 of 1866, decided on the 30th July 1867), where it was held that the proper way to take an account between mortgagor and mortgagee was to give credit for the rents and profits and to charge the interest from the date of mortgage. But where the profits are by agreement to be received in lieu of a portion of the interest, no account can be taken of the profits, and the remaining portion of the interest must only be allowed for six years. The Exhibit, No. 6, provided that for a part of the debt no interest should be charged, but that the profits should be enjoyed in lieu of interest. Where the Court does not order an account to be taken of the interest on the one side and of the rents and profits on the other, we have held that in cases to which Reg. V. of 1827, secs. 11 and 12 applies—that is, cases where the contracts were made before Act XXVIII. of 1855 came into operation—the arrears of interest must be limited to six years. The effect is, that where an account is not ordered, the parties are put into the same position as if the suit was simply one to recover the principal money and interest. We must, therefore, modify the decree according to the views above expressed, by adding to the sum allowed the principal sum due under the bond, No. 6, and six years' interest on the amount which bore interest according to the terms of the bond, and we must also decree that the plaintiffs do redeem the mortgaged property, on payment of the aggregate sum, within six

1869.

VITHAL MAHA'DEV *et al.* *v.* DA'UD MUHAMMAD HUSEN *et al.*

months from the date of this decree, or that, in default, they be foreclosed of all right or equity of redemption in or to the said property.

NEWTON, J.—Concurred.

Decree modified.

Referred Case.

April 20.

BA'LA'JI MAHA'DEV .....*Plaintiff.*
KRISHNA'JI bin CHIMNA'JI *et. al*.....*Defendants.*

Stamp—Single document containing two contracts.

Where a document contained two distinct contracts requiring separate stamps, but the whole was impressed with one insufficient stamp, *it was held*, that, this stamp might be taken into account in making up the aggregate of the stamps required.

CASE stated for the opinion of the High Court by Janárdan Vásudevji, Judge of the Court of Small Causes at Puṇá under sec. 22 of Act XI. of 1865 :—

"The two suits have been instituted by the same plaintiff against two different individuals and against their surety, who is the same in both cases, on a promissory note which runs as follows :—

'We, Sambhu bin Mahádji Khengrá and Krishná bin Chimnáji Khengrá, Thalkari of Mouje Rihe, Tarf Pávan Mával, execute this note unto Báláji Mahádev Ketkar, to wit, that we purchased from you, on the 5th Vaishákh Vadya, the following quantities of grass at Rs. 20 per 1,000 bundles out of the stock which you had bought at Mouje Rihe, namely :—

'I, Sambhu bin Mahádji Khengrá, (bought) 500 bundles of grass, the price of which is .....Rs. 10 0 0

'I, Krishnáji bin Chimnáji Khengrá, (bought) 400 bundles of grass, the price of which is.....Rs. 8 0 0

'Total Rs.... 18 0 0

In words, eighteen. Interest on this is to run at one per cent. per mensem from the date on which the grass was purchased. We promise to pay the principal with interest in the month of Márgashirsh of the current

1869.

BA'LA'JI MAHA'DEV v. KRISHNA'JI CHIMNA'JI *et al.*

year before the Pornimá (the 15th of the month)' &c. &c. 'For this, I, Báli bin Bahirú Khengrá, Thalkari of the same village, stand security. The debtors will pay as stipulated above. Should they fail, I will, without referring (you) to the debtors, pay according to the terms of the above agreement, &c.'

"The promissory note does not contain any words which may go to fix one principal debtor with liability for the debt of the other, though the surety is the same for both. The liability of each is restricted to his own debt. The agreements of the two principal debtors are, therefore, two distinct contracts, though written on one paper, there being no community of interest between them; and, as such, each requires a separate stamp of two annas. The document, however, has a stamp of two annas impressed on it, and a question here arises whether the stamp already borne by the instrument may be taken into account in making up the aggregate of the stamps required for the two agreements. I should think that it should not, as it cannot be ascertained to which of the agreements the stamp used was intended to be applied, and the English cases (cited in Chitty on Contracts, 6th edition, page 118) in connection with this subject, seem to support this view."

PER CURIAM (COUCH, C. J., and NEWTON, J.):—The Court is of opinion that the stamp of two annas already on the instrument may be taken into account in making up the aggregate of the stamps required.

Special Appeal No. 93 *of* 1869. April 20.

BA'LOJI TA'MA'JI POTHA'R *et al.* .....*Appellants.*
TAMANGOUDA' bin GHANASYA'M GOUDA' .....*Respondent.*

Relinquishing or omitting to sue for portion of claim—Mortgagor—Redemption Suit—Over-payments—Civ. Proc. Code, Sec. 7.

Where a mortgagor filed a suit to redeem mortgaged lands, alleging that the mortgagees in possession had been over-paid, but did not in that suit, claim to recover the over-payments which were, therefore, not awarded to him,

It was held, that he could not recover such over-payments in a fresh suit brought for that purpose, as his claim was barred by sec. 7 of the Code of Civil Procedure.

THIS was a Special Appeal from the decision of John Jardine, Assistant Judge at Dhárwár, in Appeal Suit No. 150 of 1868, confirming the decree of the Munsif of Belgám.

The defendants being mortgagees of certain lands of the plaintiff, the plaintiff instituted a redemption suit against them and recovered possession of the lands without any payment, as it was found that they had been over-paid.

The plaintiff then instituted the present suit to recover with interest the amount over-paid. The Munsif and the Assistant Judge awarded the claim.

The first issue laid down in appeal was—"Is the claim barred under sec. 7 of Act VIII. of 1859 ?" and the following was the finding of the Assistant Judge on the point:—

"My finding on the first issue is that the claim is not barred under sec. 7 of Act VIII. of 1859.

"From a certified copy of the plaint (Appeal No. 15) in the original suit for recovery of the mortgaged lands, it appears that that suit was filed on the 22nd of January 1866. The plaint states that, as the defendants refused to give the plaintiff, the mortgagor, an account, he had been unable to

1869.

BA'LOJI TA'MA'JI POTHA'R *et al.* v. TAMANSUDA' GHANAYA'M GOUDA'

sue for the balance due to him, but that he meant to bring another suit for balance of account. He probably hoped that he would get a discovery in the suit for the land, and feared to sue for the balance at that time, as he could not value the claim in any exact manner, but, as the new Stamp Act of 1867 was not then published, he might have sued at an approximate estimate without much additional expense. The question argued yesterday is whether the present claim arises from a different cause of action from that formerly tried for the recovery of the land. The parties are the same and opposed in the same relations, and if the plaintiff could have made any estimate of the money due to him at the time, he could have got his right established at the same time as he recovered the land. It appears from the Joint Judge's finding, No. 42, which was confirmed on Special Appeal by the decree, No. 44, that one principal fact ascertained was that the plaintiff had discharged all the debts which he owed to the defendants as mortgagees in possession; but no issue was framed to ascertain the exact sums due and paid, and the difference between them.

"My reasons for holding that this claim can be separately brought, are the following: The plaintiff, from ignorance, was unable to ask for this particular description of relief, and the case to some extent resembles that of *Sabeerkhan* v. *Kali Doss Dey* (*a*). But the evidence shows that the claim is substantially one for mesne profits wrongfully kept by the defendants, and, therefore, by sec. 10 of Act VIII. of 1859 it is a distinct cause of action."

The appeal was argued before COUCH, C. J., and NEWTON, J.

Shántárám Náráyan for the appellants—The plaintiff has omitted to sue for a portion of his claim in the former suit, and his claim for such portion cannot now be entertained: Act VIII. of 1859 sec. 7. He cannot abandon a ground of claim which was a proper subject of consideration in that suit, and now bring this fresh suit in respect of it: *Udayá*

(*a* 1 Calc. W. Rep. Civ. R. 199

1869.

BA'LOJI TA'MA'JI POTHA'R et al v. TAMANGOUDA' GHANASYAM GOUDA.

Tevár v. *Kátámá Náchiyar* (*b*). His remedy, if any, was to apply to have the former decree amended (*c*).

Ganpatráv Bháskar for the Respondent. The claim is really a claim for mesne profits received after the mortgagees were no longer entitled to hold the land, the debt being extinguished; it is therefore a distinct cause of action: Civil Procedure Code, sec. 10. It has been held by the Calcutta High Court that a suit for redemption does not bar the mortgagor from suing the mortgagee for mesne profits received by the latter between the date of the suit and the execution of the decree: *Baboo Gour K. Singh* v. *Sahay Fukeer Chund* (*d*).

COUCH, C. J.—In this case, the plaintiff, who claims under the mortgagor, sues to recover over-payments on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed was, that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum over-paid; and that, therefore, the first suit should have claimed both possession and the surplus, as required by sec. 7 of the Code of Civil Procedure, which provides that, "every suit shall include the whole of the claim arising out of the cause of action." The proper decree would then have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to him.

But the plaintiff, though he believed that there was a surplus, deliberately abstained from making any claim for the sum which might be found due to him. The case therefore clearly comes within the provision of sec. 7 of the Code, that, "if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or

(*b*) 2 Mad. H. C. Rep. 131. (*c*) Fisher on Mortgages, para. 1,602, p. 881 (2nd ed.) (*d*) 7 Cal. W. Rep. Civ. R. 364.

1869.

BA'LOJI TA'MA'JI POTHA'R *et al.* v. TAMANGOUDA' GHANASYA'M GOUDA'.

omitted shall not afterwards be entertained." Here the plaintiff omitted to include in the first suit the whole of the claim arising out of the cause of action, and, whatever may be the merits of the case, we are bound to give effect to the provision of the law mentioned above, and must reverse the decrees of the lower Courts and throw out the plaintiff's claim as barred by sec. 7 of the Code.

NEWTON, J.—Concurred.

Decrees reversed.

reversed, and we declare that the order for the levy of the new rates from the plaintiff, in the fiscal year 1867-68 was illegal, as well as the distraint made under that order, and [redacted] award to the plaintiff the sum of Rs. 29-2-4, being the [redacted]nt claimed in the plaint, with interest at 9 per cent. per [redacted] from the date when the additional assessment was [redacted] paid, till the date of repayment. We also direct that [redacted]dant pay all the costs which may have been in- the plaintiff in this Court, and in the Court below.

1869.

GOVIND VINA'YAK GADRE v. THE COLLECTOR OF RATNA'GIRI'.

Decree reversed with costs.

[redacted] *rred Case.*

April 27.

[redacted] JAYASANGJI .....*Plaintiff.*

SHIVA'JI .....*Defendant.*

missory note for payment of grain—Act X. of 1862, *Schedule A.*

An instrument, in the form of a promissory note for grain, should be stamped under Art I. of Schedule A. of Act X. of 1862, with a stamp of the value of one rupee.

CASE stated for the opinion of the High Court by Janárdhan Vásudevji, Judge of the Court of Small Causes at Puṇá, under Sec. 22 of Act XI. of 1865.

"In this suit the plaintiff sues the defendant for the recovery of five-and-a-quarter maṇs of *nágli* and three maṇs of *bhát*, or their value, Rs. 24-12-0, on a promissory note dated the 5th of August 1865.

"The note is for one-and-three-quarter maṇs of *nágli* and four-and-a-half maṇs of *bhát*, and is written on a stamp of two annas.

"The defendant, amongst other pleas, pleads insufficiency of stamp for the promissory note.

"The question for consideration, therefore, is under what article of schedule A annexed to Act X. of 1862 will a promissory note for grain come.

"A note of this description will not come under either the 10th or the 12th article of that schedule, as both those

1869.

LACHIRA'M JAYASANGJI v. RA'MJI SHIVA'JI.

articles expressly refer to promissory notes or bonds, or other obligations, for the payment of *money*. Nor can Article 18, which provides for an optional stamp, take it in, as the bonds therein contemplated are bonds for the eventual payment of money; the term bond, in its legal sense, imp[lies] an obligation to pay a certain sum of money eith[er] lutely or conditionally. The only head, then, und[er] bond or promissory note for the payment of gr[ain] brought is Article 1 of Schedule A. and a st[amp] Rupee will therefore be necessary for such instru[ment]

"Hitherto the stamp for obligations of this [kind] been regulated by the value of [grain] in secur[ity] but this seems to be a remnant of the practice wh[ich] under the old stamp law, Reg. XVIII. of [1827] was fully authorised by the terms 'sum or [value]' Appendix B. to that Regulation; but there is [no] sion in the present stamp law."

The promissory note, alluded to in the case, was as follows:—"Debt-bond, dated the 13th of the month of Shrávaṇ Shudhya, Shake 1787, the name of the Samvachhar (year) being Krodhan. On that day the bond was given in writing to the creditor, named Rájashri Gámbhirmal Jayasingji Seṭ Márváḍi (of) the Shop (at) Mouje Vadgám Tarf Nane Mával, by the debtor, named Rámji bin Shiváji Sonváṇi inhabitant of Mouje Náyagámi of the Tarf aforesaid, now at Vaḍgám. I have borrowed from you grain principal as mentioned below :—

"One-and-three-fourths mans of *nágli* by Kaili sir measure	1¾ maṇs.
"Four-and-a-half mands of *bhát* (rice in husk) Sáli by Kaili sir measure.....	4½ ,,
	6¼ maṇs."

"In all six-and-a-quarter maṇs, which (I) shall give (back) as a loan in the month of Margshirsh, of the Shake aforesaid. Should the (same) remain (unrepaid in kind) thereafter, I am to go on paying *wádh* (increase) at 1

(namely) one páili per maṇ per mensem from the *Istakbil* (*i.e.*) the date of the bond, till your grain is repaid (in kind). I am to raise no objection. I, of my own accord and pleasure, and in sound mind, have duly given this bond."

1809.
LACHIRA'M JAYASANOJI v. RA'MJI SHIVA'JI.

PER CURIAM (COUCH, C. J., and NEWTON, J.):—The Court is of opinion that the document in question requires a stamp of one Rupee, under Article 1 of Schedule A.

Referred Case.

SITA'RA'M AMRUT *et al* .....*Plaintiffs.*
BHAGVANT JAGANA'TH *et al*. .....*Defendants.*

June 15.

Mesne profits—Separate suit—Res Judicata.

When a suit is brought to recover possession of immoveable property, and the decree does not provide for the *mesne* profits that accrued during the suit, a separate suit may be maintained for them. Where, however, it can be shown that the omission in the decree to provide for *mesne* profits was the deliberate act of the Court, the defendant may set that up as a defence in the separate suit.

CASE stated for the opinion of the High Court by Janárdán Vásudevji, Judge of the Court of Small Causes at Puná, under Sec. 22 of Act XI. of 1865:—

"This suit is one for mesne profits of land sought to be recovered under the following circumstances:—

"The land in question was mortgaged by the plaintiffs' grandfather to one Gopálráv Deshmukh for, it was alleged, Rs. 21 in 1834-35, and, after the death of the said Gopálráv, the mortgage was assigned by his son, Yeshvantráv, to the defendants, with possession of the land. On the 29th of July 1864 the plaintiffs instituted a suit against their mortgagee's son, Yeshvantráv, and against the present defendants for the recovery of the land in the Court of the Munsif of Puṇá. Yeshvantráv, however, did not enter an appearance in that suit. Only the present defendants defended it, and the Munsif, having found that Yeshvantráv had mortgaged the land to the present defendants as security for a loan of Rs. 36, and that the defendants had paid Rs. 122-11-3 for assessment due on that land, decreed that, on payment by the plaintiffs to the present defendants of

1869.

SITA'RA'M AMBUT *et al.* *v.* BHAGVANT JAGANA'TH *et al.*

those two sums, aggregating Rs. 158-11-3, the latter should deliver up possession of the land to the former. On appeal, however, by the plaintiffs, the District Judge of Puṇá, on the 26th of February 1867, amended the Munsif's decree by ordering the restoration of the land to the plaintiffs on payment by them of Rs. 21, which they admitted was the debt for which the land had been mortgaged by their ancestor to Gopálráv Deshmukh; and which their mortgagee's son Yeshvantráv did not appear to dispute; and possession of the land was accordingly, on execution being sued out, delivered to the plaintiffs on the 26th June 1867. The plaintiffs now seek to recover from the defendants the mesne profits of the land, alleged to amount to Rs. 135, for three years intervening between the date of their original suit and that on which possession was delivered to them.

"The defendants, *inter alia*, put in the following pleas:—(1) That the plaintiffs ought to have, in their suit for thy recovery of the land, asked for the mesne profits which thee now seek to recover, and that a separate suit will not lie. (2) That the plaintiff's mortgagee, Gopálráv Deshmukh's son, Yeshvantráv, and not the defendants, are answerable for any loss of income which the plaintiffs may have sustained by having been kept out of possession of the land.

"With regard to the first of these points I observe a decision of the High Court in the case of *Rádhábái* v. *Rádhábái* (*a*), in which it has been held that mesne profits from the date of suit for the recovery of land till delivery of possession cannot be awarded in the matter of execution, unless the decree provides for them, but that a separate suit will lie for such mesne profits. As to the latter portion of this ruling I have some doubts, which, in deference to the authority and judgment of their Lordships, I crave leave respectfully to submit for their consideration.

"Mesne profits, from the date of suit till delivery of possession, and interest from the date of suit till payment, are placed, by Secs. 196 and 193 of Act VIII. of 1859, in the same category; that is, both are left to the discretion of the

(*a*) 4 Bom. H. C. Rep. A. C. J. 181.

Court adjudicating on the subject matter of the suit. When, therefore, a decree is silent on the point, the natural inference to be drawn is either that the Court making the decree did not, for some reason or other, think fit to award the mesne profits or the interest, as the case may be, or that the point was not urged at the time of trial, and, therefore, not adjudicated upon; in other words, it was an omission which, I should think, can only be rectified by the remedy of a review, and not by that of a separate suit. If mesne profits, which have not been awarded by the decree adjudging possession of the land to which they refer, can be recovered in a separate suit, it must follow that interest, which has not been awarded by a decree for money, may likewise be recovered in a separate suit; but I have not met with any case in which it has been so held. It may be urged that a claim for the recovery of land, and a claim for the mesne profits of such land are declared by Sec. 10 of Act VIII. of 1859 to be distinct causes of action, but they are so declared within the meaning of the 8th and 9th sections, which have in view no other object than the convenience of trial, and not within the meaning of the 7th section, which prohibits the splitting up of a cause of action on pain of forfeiture of the portion of claim omitted in the suit brought. A claim for land and a claim for the mesne profits of such land have always been regarded as constituting one cause of action in the same manner as a claim for money and a claim for interest thereon are. * * * *

The case came on this day before COUCH, C. J., and WARDEN, J., when the following judgment was delivered by

COUCH, C.J.—In this case the original suit was brought to redeem land which had been mortgaged, and, by the decree of the District Court, the defendants were ordered to restore the land on payment of the principal sum of Rs. 21 only. No allowance was made to the defendants either for interest, or for Rs. 122-11-3 which they had paid for assessment. From this, I think, it must be inferred, either, that by the terms of the mortgage the profits of the land were to be taken instead of interest, or that the Court was of opinion

1869.
SITA'RA'M AMBUT *et al* *v.* BHAGVANT JA'GANA'TH *et al.*

that no account should be taken between the parties, and that the mortgagees should not receive interest or account for the mesne profits. If the plaintiffs are to have the mesne profits for the three years between the commencement of the suit and their obtaining possession, they ought to be charged with interest on the Rs. 21 at the agreed rate, and the defendants ought to be allowed for any assessment they have paid. But if, by the terms of the mortgage, the profits were to be taken instead of interest, there was no impropriety in the original decree not directing an account to be taken, or charging the defendants with mesne profits pending the suit. In a case of this description the plaintiff is precluded by the decree from bringing a separate suit for mesne profits; and if he ought to have had them, he should have applied for a review of the decree. On this ground, then, I am of opinion that the present suit cannot be maintained.

But as the Judge of the Small Cause Court has raised the question whether a separate suit for mesne profits can be brought in any case, and has submitted to us his reasons for his opinion that it cannot, I think it is better that we should now determine that question. He relies upon Sec. 7 of Act VIII. of 1859, considering that "ordinarily a claim for land and a claim for the mesne profits of such land constitute one cause of action," and that, if the mesne profits are not claimed in the original suit, the right to them is lost. Now, in a suit for the recovery of land the cause of action is the wrongful possession by the defendant of the plaintiff's land at the time of bringing the suit; that being established, the plaintiff is entitled to recover the land, and it is immaterial when the defendant took possession, and whether he did so wrongfully, or, having been in possession rightfully, his right to it has ceased. But in a suit for mesne profits the cause of action is the dispossession of the plaintiff, and the keeping him out of possession, and the receipt by the defendant of the profits of the land during the period for which the mesne profits are claimed. This is a different cause of action from the other, and the practice of regarding them as constituting one cause of action alluded to by the Judge

of the Small Cause Court was an erroneous one. As to interest, in some cases a claim to it may be a separate cause of action from the claim to the principal sum; as where there is a contract to pay interest at stated periods before the principal sum becomes due. It is probable that Sec. 10 was inserted in Act VIII. of 1859 in consequence of the then existing practice, and to prevent any doubts being raised. Its not referring to Sec. 7 cannot make a claim for land and a claim for mesne profits one cause of action, if in fact they are not so; and their being so is inconsistent with Sec. 11 of Act XXIII. of 1861. If they were, no separate suit could ever be maintained for mesne profits, it being absolutely prohibited by Sec. 7 of Act VIII. of 1859, and the prohibition in sec. 11 in the cases coming within that section is unmeaning. Hitherto, wherever it has been held that a separate suit for mesne profits could not be maintained, the decision of the Court has been founded upon Act XXIII. of 1861. It has never, as far as I am aware, been thought that Sec. 7 of Act VIII. was applicable. Where the claim for land and the claim for mesne profits are joined in the same suit, it was still necessary to give the Court power to provide for mesne profits until the delivery of possession, as these could not properly be claimed in the plaint, the cause of action, namely, the plaintiff being kept out of possession during the suit, arising after the suit was instituted. Sec. 196 of Act VIII. of 1859, therefore, provides for this, as Sec. 10 of Act XXIII. of 1861 does for interest; but it is not imperative on the Court; and the High Court at Calcutta has held in *Haramohini Chowdhrain v. Dhanmani Chowdhrain* (*b*) that where the decree has not provided for the mesne profits during the suit a separate suit may be maintained for them. I concur in that opinion, though not without having had some doubt; as it might be that the omission to provide for the mesne profits was the deliberate act of the Court, which considered that under the circumstances of the case they ought not to be allowed. Whenever this can be shown, the defendant ought to be allowed to set it up as a defence in the separate suit.

WARDEN, J., concurred.

(*b*) 1 Bengal L. Rep. App Civ. 138

1869.
June 16.

Special Appeal No. 81 *of* 1869.

KA'SHIDA'S GOVINDBHA'I .....*Appellant.*
THE B. B. & C. I. RAILWAY COMPANY... *Respondents.*

Limitation—Crops—Moveable Property—Act XIV. of 1859, *Sec. I., cl.* 2.

A suit for damages for injury to crops is a suit for damages for injury to personal property within the meaning of cl. 2 of sec. I. of the Limitation Act.

THIS was a Special Appeal from the decision of R. W. Hunter, Acting Judge of the District of the Koṇkan at Tháṇá, in Appeal Suit No. 38 of 1868.

Káshidás Govindbhái sued the defendants to recover damages sustained by him in consequence of the defendants having omitted to construct culverts for the removal of surplus water from the plaintiff's field, whereby his crops were injured.

The defendants contended *inter alia* that the suit was barred by cl. 2 of sec. I. of Act XIV. of 1859, the claim being one for injury to personal property.

The Munsif of Bássein, overruling the objection, awarded the claim.

In appeal the Judge reversed the Munsif's decree. The following is an extract from his finding on the question of limitation:—

"The decision in Special Appeal No. 193 of 1866, *Sri Viswámbhára* v. *Sri Sáradhi* (*a*) seems to be very nearly a case in point. That was a suit to recover damages for loss of produce caused by the interference of the defendant with the plaintiff's right to the flow of water from a canal. The lower Courts treated the claim as one for damages for injury to personal property, and applied sec. 1, cl. 2 of the Limitation Act (XIV. of 1859) to it. The Madras High Court held that there was no injury to personal property, that

(*a*) 3 Mad. H. C. Rep. 111

the injury was to an easement or an incorporeal right attaching to real property. The inference I draw from that case is, that if the plaintiff therein had failed to prove the incorporeal right asserted by him, his claim must have been thrown out as being one of the nature ascribed to it by the lower Courts.

"To rebut this inference my attention has been directed to the case of *Raj Chunder Ghose* v. *Joy Kishen Mookerjee* (*b*), where the plaintiff sued for compensation for injury to land resulting in loss of crops which that land might have produced but for the illegal act of the defendant in cutting a watercourse, whereby the water flowed upon the plaintiff's land and prevented it from being sown. But that is obviously not a case in point, as the damage was caused to the land and not to the crop. * * *

"I therefore hold that the injury, if any, done in this instance was not an injury to any incorporeal right possessed by the plaintiff in respect of a watercourse, nor an injury to his land (for the plaint does not set forth that the land itself was in any way injured); but I hold it to be simply an injury to rice crops or personal property, and, therefore, the claim is barred by Sec. 1, Cl. 2 of Act XIV. of 1859."

The Special Appeal was argued this day before COUCH, C. J., and LLOYD, J.

Dhirajlál Mathurádás (with him *Shivshankar Bálkrishna* for the appellant. The decision of the Madras High Court in *Sri Viswámbhárá* v. *Sri Sáradhi* (*c*) does not apply to this case, but the decision that is applicable here is the one given by the Calcutta High Court in *Raj Chunder Ghose* v. *Joy Kishen Mookerjee* (*d*). An injury to crops is not an injury to personal property, and therefore the limitation of six years applies to the case on the analogy of the ruling in *Muhammad Sileman* v. *Satu Valad Harji* (*e*), where it was held that crops which have not been severed

(*b*) 4 Calc. W. Rep. Civ. R. 76.
(*c*) 3 Mad. H. C. Rep. 111. (*d*) 4 Calc. W. Rep. Civ. R. 76.
(*e*) 5 Bom. H. C. Rep. A. C. J. 90.

1869.
KA'SHIDA'S GOVINDBHA'I v. B. B. & C. I. RAILWAY CO.

from the ground are not moveable property within the meaning of the term as used in Sec. 19 of the Mofussil Small Cause Court Act (XI. of 1865).

Green (with him *Winter*) for the respondents. The plaintiff had no easement over the land taken for the Railway, and the suit was clearly barred.

COUCH, C. J.:—The Judge has come to a right decision. Cl. 2 of Sec. 1 of the Limitation Act prescribes the period of one year to "suits for damages for injury to personal property," and crops have always been considered personal property. There may be cases where for the purposes of certain Acts they are not so considered; but in the Limitation Act the words 'personal property' were used in their ordinary sense, which includes crops. We must therefore confirm the decision of the Judge.

LLOYD, J., concurred.

Decree confirmed

June 16.

Special Appeals Nos. 74 *and* 84 *of* 1869.

TA'PIDA'S GOVINDBHA'I.....*Appellant.*
THE B. B. & C. I. RAILWAY COMPANY.....*Respondents.*

THE B. B. & C. I. RAILWAY COMPANY ...*Appellants.*
TA'PIDA'S GOVINDBHA'I .....*Respondent.*

Land taken up for Railway Company—Damages caused to adjoining lands—Separate suit when maintainable—Compensation—Act VI. of 1857.

When land is taken up for a Railway Company under Act VI. of 1857 the owner should claim for all damages likely to be caused to his adjoining lands by the works of the Company; and no suit will lie for damages so caused if they could reasonably have been foreseen at the time of the fixing of compensation.

Whether such damages could reasonably have been foreseen or not is a question of fact to be determined by the lower courts.

THESE were cross Special Appeals from the decision of R. W. Hunter, Acting Judge of the Konkan District at Thánáá, in Appeal Suit No. 173 of 1868, reversing the decree of the Munsif of Bassein.

1869.

TA'PI'DAS GOVINDBHA'I v. B. B. & C. I. RAILWAY CO. and B. B. & C. I. RAILWAY CO. v. TA'PI'DAS GOVINDBHA'I.

Tápidás Govindbhái sued the Bombay, Baroda & Central India Railway Company to recover damages caused, from the year 1863 to the year 1866, to the fields and crops of the plaintiff by reason of the defendants having failed to provide a proper passage for the waters of a certain creek.

The defendants' railway adjoined the land of the plaintiff on the eastern side, and, when the rains came down, led to a vast accumulation of the creek waters which were thus thrown back upon the lands of the plaintiff and caused the injury complained of.

The defendants pleaded, *inter alia*, the law of limitation as to the damages that accrued for the first three years; that culverts and openings had been provided where necessary; that the line had been constructed under the sanction of Government; that the suit was not maintainable against the Company, as it had not been provided in the Act Incorporating the Company that they should be responsible for such damages.

The Munsif of Bassein rejected the claim, but in appeal the Acting District Judge reversed his decree, and awarded to the plaintiff Rs. 297-8 for injury to the crops of 1866, together with Rs. 0-4-6 for expenses incurred by the plaintiff, on the grounds stated at length in appeal No. 38 of 1868 (*a*). The District Judge rejected the claim of the plaintiff for the injury caused to his crops for the preceding years. The following is an extract from the finding of the Judge in Appeal Suit No. 38 of 1868:—

"Although I have held that the plaintiff cannot claim a servitude from the Railway Company's land, nor demand that an outlet for this water should be made through their line, still I think he can claim damages for the injury which has been shown to have been caused to his crops through the negligence of the Railway Company in omitting to provide sufficient waterway at this spot in the construction of their line. It has been urged that according to Sec. 24 of

(*a*) S. A. No. 81 of 1869; See *ante* p. 114.

1869.

TA'PIDA'S GOVINDBHA'I v. B. B. & C. I. RAILWAY CO. and B. B. & C. I. RAILWAY CO. v. TA'PI'DAS GOVINDBHA'I.

Act VI. of 1857 the compensation originally awarded to the plaintiff for the land that was once his and is now the Company's must 'include any damage which may be sustained by any of the persons interested therein in respect of any adjoining land held therewith,' and that this fact must constitute a bar to the claim; but in the case of *Lawrence* v. *The Great Northern Railway Company* (*b*), where by the construction of the railway, without sufficient openings, the flood waters could not spread themselves as formerly, but were penned up and flowed over a bank upon the plaintiff's lands, it was held that, though there was no express clause in their Act obliging the Railway Company to make openings for flood waters in that district, yet that an action would lie against the Company for the injury to the plaintiffs' lands, and that, though the amount of compensation awarded covered all damage known or contingent by reason of the construction of the Railway on the lands purchased, and all other damage arising from the construction of the Railway at other places, which was *apparent and capable of being ascertained and estimated when the compensation was awarded*, yet that *it did not include any contingent and possible damage which might arise afterwards* by the works of the Company at other places *which could not have been foreseen* by the arbitrator. Now, in the case before us, although the flood waters of the two years in question were unusually large, the evidence shows that these floods have occurred more or less in each year, and caused damage to the crops sown in this land in each year, until the Railway Company recently made an outlet through that part of their line, ostensibly to carry off the water that stagnated within their own limits, but just as probably to obviate the damage caused by the flood to the crops of the adjoining land for want of an outlet; at any rate an outlet exists now which did not exist when the damage in question occurred, and as the damage could have been obviated, as is proved by the plaintiff's witnesses, by the construction of an outlet in the first instance, I think I must hold that this was a contingent

(*b*) 20 L. J. Q. B. 239.

unforeseen damage for which no provision was secured by the Government from the Railway Company, and which therefore was not covered by the amount of compensation awarded to the plaintiff, and that the Company have, by a negligent exercise of their statutory powers, and by a disregard of the maxim *sic utere tuo, &c.*, rendered themselves liable for the damage sustained by the plaintiff as a result of their negligence—(Addison on Wrongs, Chapter XVI). The plaintiff, therefore, has a right of action."

The Special Appeals were heard this day before COUCH, C.J., and LLOYD, J.

Green (with him *Winter*) for the appellant, in the second appeal (and with him *Shántárám Náráyan*) for the respondents in the first: These damages should have been claimed and determined at the time when the amount of compensation for the plaintiff's land taken for the Company was fixed under Sec. 24 of Act VI. of 1857, since floods are of annual occurrence, and the damages likely to be caused by them could have been foreseen and estimated. That is the principle deducible from the cases decided in England under Sec. 63 of the Lands Clauses Consolidation Act (8 and 9 Vict., c. 18), and that Section does not materially differ from Secs. 24 and 25 of Act VI. of 1857.

Nánábhái Haridás for the appellant in the first appeal, and respondent in the second: Whether the damages were foreseen or not is a question of fact, and the Judge has decided that they were unforeseen.

COUCH, C. J.:—In *Chamberlain* v. *The West-End of London and Crystal Palace Railway Company* (c), Lord Chief Justice Erle observed: "It is well-known law that under these statutes a party must make one claim for damages, once and for all, for all damages that can reasonably be foreseen, and have one inquiry and one compensation." The question therefore which the Judge ought to have determined in this case was, whether at the time the compensation was awarded for the land taken the damages to

(c) 32 L. J. Q. B. 173, 178.

1869.

TA'PI'DAS GOVINDBHA'I v. B. B. & C. I. RAILWAY CO. and B. B. & C. I. RAILWAY CO. v. TA'PI'DAS GOVINDBHAI'.

the adjoining land could reasonably have been foreseen. If they could have been, the only mode in which the plaintiff could have obtained compensation would have been by the award under Sec. 24 of Act VI. of 1857, and the decree therefore ought to have been for the defendant; but if the damages could not reasonably have been foreseen, the decree ought to have been for the plaintiff, since the compensation awarded for the land would in that case be no bar to the present suit. Now it is really a question of fact whether the damages could have been foreseen or not. The language of the Judge below, however, does not amount to a finding on the point; since he says—"I think I must hold that this was a contingent unforeseen damage for which no provision was secured by the Government from the Railway Company." He does not say that the damages could not have been foreseen. The finding is not to my mind sufficient. We should be justified in deciding the case if the evidence was of such a nature as that it could not have supported the finding at all; but I am not prepared to say that such is the case here.

We must, therefore, confirm that portion of the decree appealed against in suit No. 74 of 1869 with costs, and reverse that portion of the decree appealed against in suit No. 84 of 1869, and remand the case for retrial with reference to the above observations.

Decree reversed and case remanded.

Special Appeal No. 62 *of* 1869.

1869.
June 28.

SITA'RA'M DA'NDEKAR.....*Appellant.*
GANESH GOKHLE .....*Respondent.*

Mortgage—Interest—Entry by Mortgagee upon default of payment of Interest—Equitable relief.

The defendant mortgaged certain premises to the plaintiff by a deed of mortgage which contained a condition that the mortgagor should remain in possession so long as the interest was regularly paid. Default in payment of the interest was made, and the mortgagee sued for possession of the mortgaged premises.

Held, that the mortgagor was entitled to equitable relief against the entry of the mortgagee on payment of all arrears of interest, together with interest upon each instalment and costs; and three months' time was allowed to the mortgagor to make such payment.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Ratnágiri, in Appeal Suit No. 312 of 1868, amending the decree of Shrídhar Náráyaṇ, Munsif of Kháṛepáṭaṇ.

The plaintiff, Sitárám Dándekar sued for the possession of certain premises which had been mortgaged by the defendant to him. One of the terms of the mortgage was that until default was made in the payment of interest by the defendant he should retain possession of the mortgaged premises. The plaintiff also claimed Rs. 29-7-3, the amount of interest due from the defendant to him.

The defendant answered that he had paid interest for the first year, and that, being desirous of redeeming his property, he had then requested the plaintiff to receive what was due to him, at the same time withholding payment of any further interest.

The Munsif decreed that the plaintiff should recover Rs. 199, the amount of the principal, and Rs. 23-14-0, the amount of one year's interest thereon.

The Court of appeal, holding that the plaintiff's suit was not for recovery of principal, gave him a decree for one year's interest only.

1869.
SITA'RA'M DA'NDEKAR v. GANESH GOKHLE.

The material portions of the mortgage deed were as follow:—

"The land, as aforesaid, together with all my proprietary rights thereto, is mortgaged to you in consideration of the above sum. I am to pay the assessment on the said land, and to enjoy it on your behalf. I will pay you every year the amount of interest on the said (principal) sum, and take receipt (for the same) from you. If in any year I fail to pay you, before the execution of (usual) lease, the amount of interest due for the previous year, in that year I will make over to you the said land, house," &c. * * *

"Whatever amount may be found due by me to you I will pay you the same ten years from this day, and redeem the mortgaged land."

The Special Appeal was heard before GIBBS and MELVILL, JJ., on the 28th of June 1869.

Vishvanáth Náráyaṇ Mandlik for the special appellant: The Acting Senior Assistant Judge has not attended to the terms of the mortgage bond. The decision of the High Court in *Sakhárám Narasimha Sardesái* v. *Viṭhu Lakhá Gavdá* (*a*) should have been followed. Possession of the land should have been decreed to the plaintiff, and interest and costs should have been awarded. The plaintiff was not bound to receive the money before the expiry of the stipulated period.

Shántárám Náráyaṇ for the special respondent: The respondent is admitted to be tenant of the appellant, and the interest which he is to pay under the terms of the mortgage bond is in the nature of rent; a default in the payment of the interest, or as we may call it, rent, is, according to the strict interpretation of the bond, to work a forfeiture; but as a Court of Equity this Court will always relieve against such a forfeiture: *Timmarsá Puráṇik* v. *Badiyá* (*b*); *Anandráv Dámodar* v. *Ardesir Hormasji*,

(*a*) 2 Bom. H. C. Rep. 225, 2nd Ed.
(*b*) 2 Bom. H. C. Rep. 66, 2nd Ed.

(S. A. No. 100 of 1865), decided on the 22nd of June 1865 by COUCH and WARDEN, JJ.

1869.
SITA'RA'M DA'NDEKAR v. GANESH GOKHLE.

GIBBS, J. (after recapitulating the facts, and tracing the progress of the case), proceeded—

The proviso of redemption in the mortgage bond contains the words "दाहा वर्षाने घईन" *dahá varshánc ghein*, and Mr. Naylor records an opinion that by virtue of those words the mortgagor could *within* ten years redeem the mortgaged property. In this view he is not correct. In the case of *Sakhárám* v. *Vithu*, cited at the bar on behalf of the appellant, it was held, after a great deal of consideration, that by Hindú as well as by English law, in the absence of circumstances or language indicating a contrary intention, the mortgagor cannot, without the consent of the mortgagee, redeem before the expiration of the period named in the proviso for redemption; the principle being that, in the absence of stipulation express or implied to the contrary, the right to redeem and the right to foreclose must be regarded as coextensive. The language expressing the proviso for redemption in that case was identical with that used in the present.

It has been urged by Mr. Shántárám that the defendant is entitled to be relieved from the consequences of default in the payment of interest. He contends that the principle laid down in the case of *Timmarsá* v. *Badiyá* should be applied here. In that case it was held that the tenant, upon payment of the costs of the suit, would be relieved from the consequence of a forfeiture for nonpayment of rent at the time stipulated for, in accordance with the practice of the Courts in England and America. Mr. Justice Story, in his work on Equity Jurisprudence, Sec. 1314, page 534, 9th ed., lays down—"The right to relief in equity, in cases of this character is now well established; and the general principle now adopted is, that wherever a penalty is inserted merely to secure a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only

1869.
SITA'RA'M DA'NDEKAR v. GANESH GOKHLE.

to secure the due performance thereof, or the damage really incurred by the non-performance." The same learned author further down in Sec. 1316 observes: "The true foundation of the relief in equity in all these cases is, that as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that, in justice, he is entitled to." This doctrine fits in with the case before us exactly. The special respondent mortgaged certain property to the special appellant, and stipulated that he, the special respondent, was to remain in possession on the condition of paying interest on the mortgage debt at stated times and rates; and there was a clause that in case of default the mortgagee was to get possession. This stipulation, we think, comes within the meaning of the words of Mr. Justice Story quoted above. It was in fact made with the sole purpose of securing punctual payment of interest.

We shall therefore amend the decree of the Lower Appellate Court, and direct that the original defendant do pay to the original plaintiff all arrears of interest on the debt, together with interest on each instalment of the same at the rate of 9 per cent. per annum from the date it became due until payment, with costs of this suit throughout, within three months from this date. If the said arrears interest thereon, and costs be not paid within the time aforesaid, the property sued for shall be delivered into the possession of the plaintiff, to be held by him under the terms of the mortgage bond.

MELVILL, J., concurred.

Decree amended.

Special Appeal No. 117 *of* 1869.

1869.
June 29.

PA'NDURANG GOVIND.....*Appellant.*
BA'LKRISHNA HARI .....*Respondent.*

Ejectment—Cause of action—Limitation.

In an action of ejectment, the plaintiff, though he cannot prove that he has been in possession of the land claimed within twelve years, must not on that account of necessity fail. He must, however, show that his cause of action has accrued within that period; and a plaintiff's cause of action arises when another person takes possession of his land, and not before.

If any question of limitation arises, the burden of showing that the cause of action has arisen within the legal period of limitation lies upon the plaintiff.

THIS was a Special Appeal from the decision of Baron DeH. Larpent, Joint Judge at Ratnágiri, in Appeal Suit No. 261 of 1868, confirming the decree of Rágho Náráyaṇ, Munsif of Vengurlá.

The plaintiff sued to obtain possession of a piece of land which he alleged he had purchased on the 31st of May 1854 under a deed, and held exclusive possession of until October 1866, when, on his planting some cocoanut and plantain trees on the land, the defendant obtained a decree of the Revenue Court, and interfered with his possession.

The defendant contended that the land claimed by the plaintiff was the defendant's land, and that he had been in possession of it for more than twelve years.

The Munsif rejected the claim as barred by the Law of Limitation.

The Joint Judge, in appeal, found that the plaintiff had not held possession of the land in dispute at any time since the date of purchase, viz., the 31st of May 1854; that, as the suit was filed in April 1867, an interval of more than twelve years had elapsed; and that, consequently, the suit was barred; that the plaintiff was a wrongdoer when, in 1866, he planted cocoanut and plantain trees on the land, and was restrained by the Revenue Court.

1869.

PA'NDURANG GOVIND v. BA'LKRISHNA HARI.

The special appeal was heard on the 23rd of June 1869 before GIBBS and MELVILL, JJ.

Amiruddin for the Appellant: The suit is not barred by the law of limitation. The law governing the case is to be found in cl. 12 of Sec. 1 of Act XIV. of 1859, and the only point to be determined is the date on which the cause of action arose. The Judge below considered that, as the plaintiff had not had possession within twelve years before the date of suit, the suit was barred. Because a plaintiff does not show possession within twelve years it does not follow that the defendant should have a judgment in his favor: *Gopeenath Mookerjee* v. *Issur Chunder* (*a*). He also cited *Deváji Goyáji* v. *Godubhai* (*b*).

Shántárám Náráyan for the Respondent: Unless the plaintiff can prove that he has been in possession within twelve years he must fail. Whatever may be the date of dispossession which the plaintiff alleges, he should be called upon to show that he has had possession within twelve years. In deciding a plea of limitation it is not for the defendant to show adverse possession: *Kedarnath Mokerjee* v. *Mohesh Chunder* (*c*), *Nawab Nazir Sidhee* v. *Woomesh Chunder* (*d*), *Mirza Mahomed* v. *Sarahutoonissa* (*e*), *Gooroodoss Roy* v. *Hurvath Roy* (*f*), *Nobokishore Dey* v. *Ramkishen Mohurir* (*g*), *Dinobhundhoo Suhaye* v. *James Furlong* (*h*), *Maharajah Koowurr Singh* v. *Baboo Nund Loll Singh* (*i*).

Amiruddin in reply: These cases do not apply here, where the defendant's possession is disputed, and even denied. Even the decree obtained by the defendant from the Revenue Court does not find possession in him.

Cur. adv. vult.

(*a*) 9 Calc. W. Rep. Civ. R. 365.
(*b*) 11 Calc. W. Rep. P. C. 35.
(*c*) 1 Calc. W. Rep. Civ. R. 67. (*d*) 2 Cal. W. Rep. Civ. R. 75.
(*e*) Ibid. 89. (*f*) Ibid 246.
(*g*) 9 Calc. W. Rep. Civ. R. 131. (*h*) Ibid. 155.
(*i*) 8 Moo. Ind. App. 199.

1869.
PA'NDURANG GOVIND v. BA'LKRISHNA HARI.

29th June—MELVILL, J.:—The plaintiff's case is that he purchased the land in dispute (which is a piece of unenclosed ground near the defendant's storehouse) in 1854, and that in 1866 he planted some trees on it, whereupon the defendant presented a petition to the Mámlatdár, who ordered the plaintiff to vacate the ground until he should establish his title in a Civil Court. For this purpose he has brought the present action; and the Joint Judge has confirmed the Munsif's decree, dismissing the suit on the ground that the plaintiff has not proved possession within twelve years. As regards the planting of the trees, the Joint Judge held that the plaintiff was a wrongdoer, and that this was no possession of the land, but an attempt by a wrong act to further the present claim.

In special appeal it has been urged on behalf of the plaintiff that, even if it be admitted that he had not possession of the land previously to the planting of the trees, yet that no one else had possession, and that, therefore, no cause of action accrued until he was obstructed by the defendant in 1866. On the other side it has been contended that, in an action of ejectment, the plaintiff must necessarily fail, unless he prove that he has been actually in possession within 12 years; and numerous cases have been cited, in which such a rule appears to have been more or less clearly laid down.

In a question of limitation there can be no doubt that the burden of proof is upon the plaintiff. Sec. 26 of Act VIII. of 1859 requires that the plaint should set forth "the cause of action, and when it accrued; and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed."

Sec. 32 provides that "if upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint." Thus, even before the plaint can be admitted, the plaintiff is under the necessity of satisfying the Court that his claim is not barred by lapse

1869.
PA'NDURA'NG GOVIND v. BA'LKRISHNA HARI.

of time. Nor does this obligation cease when the plaint has been admitted. If the defendant plead limitation, or if, although he do not plead it, it appear to the Court upon the facts that the suit was commenced after the period of limitation had expired, the Court is bound to call upon the plaintiff to prove that he has not forfeited his right of action. Act. XIV. of 1859, Sec. 1, says plainly that "*no suit shall be maintained* in any Court of Judicature within any part of the British territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding." The words are distinctly prohibitive; and, therefore, if any question or doubt on the subject arise, the plaintiff is bound to satisfy the Court that it has not been induced to entertain a suit which the law has forbidden it to entertain.

The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it, or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land.

This proposition seems so clear that it is hardly necessary to quote precedents in support of it. We will only refer to two decisions under the English Statute of Limitation, 3 & 4, W. 4, c. 27. Sec. 2 of that Act enacts that "no person shall make an entry, or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued;" and Sec. 3 goes on to say that the right of action shall ordinarily be deemed to have accrued at the time of the plaintiff's dispossession or discontinuance of possession.

In *M'Donnell* v. *M'Kinty* (*j*); Blackburne, C.J., said: "The word discontinuance means an abandonment of possession by one person followed by the actual possession of another person. This, I think, must be its meaning; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the Act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected," p. 526. In *Smith* v. *Lloyd* (*k*), which was an action of trespass, the plaintiff's replication was that the entry made by the defendants on the surface of certain land and minerals was not within twenty years after the right to make the same accrued to the defendants, or any one under whom they claimed, and that, therefore, the right of entry was extinguished. But Parke B. said: "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 & 4 W. 4, c. 27, sec. 3; for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment

(*j*) 10 Irish Law Reports, 514.
(*k*) 9 Exch. 562; S. C. 23 Law Journal Exch. 194.

1869.

PA'NDURA'NG GOVIND v. BALKRISHNA HABI.

of Chief Justice Blackburne in *M'Donnell* v. *M'Kinty*, and the principle upon which that decision is founded."

In the present case the Joint Judge has not found that the defendant was ever in possession, and the Mámlatdár seems to have found no more than that in 1866 the defendant and others were in the habit of passing to and fro across the disputed ground. This would at the most be evidence only of a right of way, and would not entitle the defendant to oppose the plaintiff's entry on the land. Assuming the plaintiff to have acquired a title by purchase in 1854, and not to have taken possession till 1866 then, if the land had remained in the meantime unoccupied, and was not in the exclusive possession of any other person in 1866, the plaintiff was in no sense a trespasser or wrongdoer. We think that the case must be remanded, in order that the Court below may find whether, at the time of the plaintiff's entry in 1866, the defendant was in possession of the ground, and if so, whether the plaintiff has proved that the defendant's possession, which constitutes his cause of action, commenced within 12 years preceding the date of action. If either of these issues be determined in favour of the plaintiff, the Court will consider the evidence of the plaintiff's title, and of any easement which may be claimed by the defendant, and pass a new decree on the merits.

Costs to follow the final decision.

Decree reversed and suit remanded.

Referred Case.

1869.
July 2.

MATHURA'DA'S JAGJIVANDA'S .....*Plaintiff.*
NA'THA' BA'JA' *et al.* .....*Defendants.*

"*Small Cause Court—Cause of Action—Defendant living outside Jurisdiction—Act XXIII. of* 1861, *Sec.* 4.

When a cause of action has arisen within the local jurisdiction of a Small Cause Court, but one of several defendants resides out of such jurisdiction, sanction may be given under Sec. 4 of Act XXIII. of 1861 by the High Court to the Small Cause Court to try the suit.

THIS was an application by Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád, under Sec. 4 of Act XXIII. of 1861, for permission to try a suit.

"A plaint has been presented to me in the Neraid Branch Court. One of the defendants named in it, Surtájiy Dáji, lives in a village within the jurisdiction of the Subordinate Judge of Kheda, and the others live, and the cause of action has arisen, within the jurisdiction of the Small Cause Court. It is therefore necessary to obtain the order of Her Majesty's High Court to enable me to proceed to hear and determine the suit.

"Sec. 4 of Act XXIII. of 1861 provides the course to be taken under such circumstances by a District Court and the Courts subordinate to it. This does not include a Small Cause Court, but the Madras High Court has decided that it is competent to a Small Cause Court to apply for sanction under that section: *Sabhapati Mudali* v. *Muttusvami Mudali* (*a*).

PER CURIAM (WARDEN and LLOYD, JJ.) :—Sanctioned.

(*a*) 1 Mad. H. C. Rep. 103.

1869.
July 6.

Special Appeal No. 329 *of* 1868.

TVA'TAT SVA'MI GURU TVA'TAT SVA'MI..... *Appellant.*
ANDA'NYA CHARANTI GURU TVA'TAT SVA'MI
and PATRI MURI GURU TVA'TAT SVA'MI, *Respondents.*

Prescription—Office held by successive appointees—Reg. V. of 1827, *Sec.* 1, *cl.* 1.

When a religious office with lands attached thereto is held by several *gurus* in succession, each holding such office by virtue of an appointment made on his accession, no proprietary right can be acquired by such *gurus*, in the office or lands against the patron or owner, by prescription, as such a case does not come within the meaning of cl. 1 of Sec. 1 of Reg. V. of 1827.

THIS was a Special Appeal from the decision of Chas. F. H. Shaw, Judge of the District of Dhárwár, in Appeal Suit, No. 360 of 1867, confirming the decree of the Principal Ṣadr Amín of Dhárwár.

This suit was instituted by Doḍ Shidling Mari Guru, the agent of Tvátat Svámi, who claimed a *maṭh* with certain lands and gardens attached to it. He alleged that the full management of the *maṭh* had been entrusted to one Andánya Svámi, now deceased; that he resigned the trust, and thereupon the plaintiff sent two other disciples, the defendants, to take charge of the *maṭh*, and that they, falsely pretending that they had been entrusted with full powers, assumed the entire management, and, on the 6th of June 1853, refused to acknowledge the plaintiff.

The defendants answered *inter aliá* that the claim was barred by the provisions of Reg. V. of 1827, Sec. 1, cl. 1; that the plaintiff was not the proprietor of the *maṭh*, and had never managed it; and that it had been in the possession of themselves and previous *gurus* for many years (more than thirty).

The Principal Ṣadr Amín threw out the plaintiff's claim, and the Judge, in appeal, confirmed the decree.

"The Court," he said, "has to consider: (1) whether the claim is barred by the law relating to limitations; (2) if it

is not, whether the appellant has proved his claims to the Mundargi *maṭh* and the lands attached thereto situated in Mundargi and Ḥálikeri. No other issues are asked for by either side.

"The Court has carefully considered the arguments of counsel, and has endeavoured to understand the evidence to be collected from the mass of useless information recorded, and the following appears to be the real state of the case.

"The Mundargi *maṭh* under a Svámi called Andánya because, as one witness says, it is his duty to dispense *an* and *dhányá* (grain), is subordinate to a higher *maṭh* presided over by a Svámi called Tvátat, because he resides or resided in a *tota*, or garden.

The subordination is shown by the numerous records in which Andánya is registered as the Vahivátdár of Tvátat Svámi, and, by Exhibits Nos. 66, 67, 68, 69, which prove that other rent-free lands held by Andánya Svámi are to be resumed by the State on the death of the then Tvátat Svámi; and, therefore, there can be no doubt but that at one time the Mundargi *maṭh* was completely under the control of the Svámi at Copul, called Tvátat. But it is shown that in 1770 A. D. the Svámi Andánya had usurped some of the powers of the Tvátat Svámi (see Exhibit No. 18), and there is no evidence to show that the Tvátat Svámi ever regained his lost position. Exhibit No. 44, dated 1797, is an arrangement to pay certain monies by the Tvátat Svámi, Shri Andánya, and another, to other parties, and the position of Shri Andánya Svámi herein is certainly that of an equal of the Tvátat Svámi. Exhibit No. 50 is a mere acknowledgment of spiritual superiority, which is not denied even now.

"It is not very clear how the parties to this suit treated each other until 1853; but the Andánya Svámi, who in that year presided over the Mundargi *maṭh*, seems to have become insane, and the *maṭh* was left to the care of the Muri Shidling. The Tvátat Svámi, taking advantage of the interregnum, came down upon the *maṭh*, and he may have gained over this man; but as soon as the respondent

1869.

TVA'TAT SVA'MI GURU TVA'TAT SVA'MI v. ANDA'NYA CHARANTI GURU TVA'TAT SVA'MI *et al.*

No. 1 was appointed Andánya Svámi, he resisted the authority of the Tvátat Svámi, and the dispute was carried into the police courts, and there was prolonged until 1857, nearly four years; during the whole of this time the *karár* Exhibit No. 1, was not produced, and that document and Exhibit No. 48 are not trustworthy; the word *gumastá* is a plain alteration of the word *guru*, and it is on these two unreliable documents that the claim is mainly based.

"The Court cannot find that Tvátat Svámi has since 1770 up to date of plant 1860, ever directly managed the *maṭh* and lands attached thereto, as set forth in the plaint; and even during the period of Andánya's insanity, when there was no Svámi, Tvátat Svámi did not take the proceeds of these lands, but was obliged to leave them in custody of Shidling Muri. Whether Tvátat Svámi or the Ayás of different village *maṭhs* selected the present Svámi to be Andánya is of little moment; it is evident that the Tvátat Svámi had no more real control over the selected nominee than a dean and chapter possess, when a congé d'élire is issued recommending a person as bishop. Andánya Svámi, respondent No. 1, and Tvátat Svámi, the appellant, are merely representatives of their respective orders, and both are equally bound by the acts of their predecessors. Tvátat Svámi, therefore, has no right to bring this claim, and it is declared barred by the law relating to limitations, Reg. V. of 1827, Sec. 1, cl. 1."

The Appeal was argued on the 3rd February 1869 before COUCH, C. J., and GIBBS, J.

White (with him *Dhirajlál Mathurádás* and *Shántárám Náráyan*) for the appellant.

McCulloch (with him *Fakirápá Lingápá* and *Bahiravnáth Mangesh*) for the respondents.

Cur. adv. vult.

6th July—COUCH, C. J.:—In this case the District Judge, finding that the appellant's predecessors had not

1869.

TVA'VAT SVA'MI GURU TVA'TAT SVA'MI v. ANDA'NYA CHARANTI GURU TVA'TAT SVA'MI *et al.*

since 1770 ever directly managed the *math*, held that the suit was barred by Sec. 1 of Reg. V. of 1827.

As it was doubtful whether that Regulation applied to such a case, judgment was deferred to see whether the Regulation had ever been so applied, and a very careful search has been made for a precedent, with the assistance of Mr. Justice Gibbs, but none has been found. The question is, therefore, for the first time before the Court. I am of opinion that the present case does not come within the first section of the Regulation, since I think that the holding of the respondents and their predecessors by virtue of appointments made on each occasion when a vacancy occurs is not a holding as proprietor so as to give the holder a right of property, but that it is a holding not contemplated by the Regulation. We therefore reverse the decree of the Lower Appellate Court, and remand the case for retrial on the following and any other issues the District Judge may think right.

1. Whether the tenure upon which the *math* was held by the defendant, Andánya Svámi, was such that the plaintiff was entitled to resume the possession of it at his pleasure.

2. Whether the appointment of the defendant was complete, and he was entitled by virtue of his office to the possession of the *math*.

If the first issue is found in the affirmative, the plaintiff will succeed; and if the second is found in the negative, then the plaintiff will equally succeed.

Decree reversed and suit remanded.

1869.
July 6.

Referred Case.

LA'LJI VAIJNA'TH ..... *Plaintiff.*
RA'VJI ABA'JI..... *Defendant.*

Year—Native date—Bond.

Where a bond, by which money lent was agreed to be repaid within one year, bore a native date only, *it was held* that the year was to be calculated according to the native calendar of which the bond bore the date.

CASE stated for the opinion of the High Court by Baron De H. Larpent, Joint Judge of Puṇa, under Sec. 28 of Act XXIII. of 1861:—

"In this case the defendant borrowed a sum of money from the plaintiff, and passed a bond by which he agreed to repay the amount within one year. The bond bears date the 1st Shrávaṇ Shudhya, Shake 1783, and this is the only date used.

"The question to be decided is whether the period should be calculated according to the native or the British calendar, and this depends on what the intention of the parties was at the time of the transaction. I think it was clearly their intention that the amount should be repaid on the next 1st Shrávaṇ Shudhya following that on which the bond was passed; and if this be so the claim is barred.

"Now it is urged by the respondent that he is entitled to calculate either according to the English or the Hindú era, whichever may be the most favourable to his interests, and he quotes S. A. No. 2818 (*a*) in support of his case.

"But it has been lately decided in the High Court in the case of *Ganpatráv bin Rámji* v. *Manu bin Mohanji* (*b*), on a case referred, that where a promissory note executed by a native bore a native date only, and was made payable in a certain number of months from such date, these months should be calculated according to the native, and not the British calendar.

(*a*) Morris' Selected Decisions, Part 1, p. 115
(*b*) 5 Bom. H. C. Rep. A. C. J 150.

"This case is similar, except that the period is the year and not the month; and following the latest decision of the High Court, I find that the time should be calculated according to the native calendar."

PER CURIAM (COUCH, C.J., and GIBBS, J.):—The Court is of opinion that the year is to be calculated according to the native calendar.

July 6.

Special Appeal No. 403 *of* 1868.

KRISHNABHAT bin HIRA'GANGD.....*Appellant.*
KAPA'BHAT bin MAHALBHAT *et al*.....*Respondents.*

Office of hereditary priest—Hindú Law—Immoveable property—Limitation—Act XIV. of 1859, *Sec.* 1, *c.* 12.

In a suit between Hindús the office of hereditary priest to a temple, though not annexed to or held by virtue of the ownership of any land, yet being by that law classed as immoveable property, should be held to be immoveable property within the meaning of cl. 12 of Sec. I. of the Limitation Act.

THIS was a Special Appeal from the decision of R. West, Acting Judge of Cánará, in Appeal Suit No. 167 of 1867, confirming the decree of the Munsif of Kumtá.

The facts of the case appear sufficiently from the judgments of the members of the Court.

The appeal was heard by COUCH, C.J., and GIBBS, J., on the 5th April 1869.

Dhirajlál Mathurádás for the appellant.

Shántárám Náráyan for the respondents.

Cur. adv. vult.

6th July—COUCH, C.J.:—The plaint in this suit stated that the plaintiff was an hereditary priest of a temple, and that in 1813 the right of worship was divided between his ancestors and the ancestors of the first defendant; that his father had performed the rites and received the emoluments during his life; but he died whilst the plaintiff was an infant; and

1869.
KRISHNABHAT HIRA'GANGE v. KAPA'BHAT MAHALBHAT *et al.*

on the plaintiff's attaining his majority, and seeking to assume his share in the worship and its emoluments, he had been prevented by the defendants, who, except the first, were the head men of the temple; and the plaint sought to have the plaintiff's right to officiate, and to take a moiety of the proceeds of the ceremonies, established.

The plaintiff's father having died more than six years, but less than twelve years, before the commencement of the suit, and the plaintiff having attained his majority more than three years before it, the Munsif of Kumtá, by whom the suit was tried, held that it was barred by the law of limitation; and the District Court, on appeal, confirmed his decree, holding that the suit was not for land or an interest in land; and the plaintiff has appealed to this Court on the ground that this decision is erroneous.

The question to be determined is, whether the suit comes within cl. 12 of Sec. 1 of Act XIV. of 1869 as a suit for the recovery of immoveable property, or an interest in immoveable property. I agree with the District Judge that the hereditary nature of the estate does not of itself make the office immoveable property and affect the term of limitation; but, in the absence of any interpretation clause, such as there is in the Indian Succession Act, 1865, I think we ought, in applying the law of limitation between Hindús, to include in the term immoveable property whatever is in the Hindú Law understood to be such. In Macnaghten's Principles, page 1, the learned author says, "Property according to the Hindú Law is of four descriptions; real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindú Law classes amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land." A corrody, according to Jimmúta Vahana, Dáyá Bhága, Chap. II., Sec. 13, signifies any thing which has been promised, deliverable annually, or monthly, or at any other fixed periods. In Elberling on Inheritance, Section 206, it is said that the

1869.
KRISHNABHAT HIRA'GANGE v. KAPA'BHAT MAHALBHAT et al.

right of performing the religious ceremonies of certain classes of people as Purohit, is by custom considered analogous to real property; and in 2 Strange H. L. 363, Mr. Colebrooke says, that if an office in a family be hereditary, the dues or profits appertaining to it must be subject to be shared; but in such case it classes with immoveables. And it would seem that the classing hereditary offices with immoveable property in Sec. 1 of Reg. V. of 1827 was in consequence of the custom amongst Hindús to consider them as such. Although, therefore, the office of a priest in a temple, when it is not annexed to the ownership of any land, or held by virtue of such ownership, may not, in the ordinary sense of the term, be immoveable property, but is an incorporeal hereditament of a personal nature, yet being by the custom of Hindús classed with immoveable property, and so regarded in their law, I think, in a suit between them, it should be held to be within cl. 12 of Sec. 1 of Act XIV. of 1859, by analogy to the rule that what are to be deemed immoveables is determined by the *lex rei sitæ*. The decrees of both the lower Courts must, therefore, be reversed, and the suit be remanded for retrial.

GIBBS, J. :—The question in this case is whether the hereditary priestship is of the nature of immoveable property or no. The Munsif and District Judge have found it not to be, and have applied cl. 16, Sec. 1 of Act XIV. of 1859 to it, and held the claim barred.

In S. A. No. 425 of 1866 I was a party with Mr. Justice Tucker to a decision in which we held as follows :—"The privileges and precedence to establish a right to which the present action was brought, were attached to an hereditary office, and were consequently what is termed in Hindú Law *nibandha*, and partake of the character of immoveable property (Strange's Manual, page 34, Sec. 139; and II. Strange H. L., page 363, Appendix to Chap. IX.);" and we held the claim came under cl. 12, Sec. 1 of the Limitation Act.

There is in my mind no doubt but that this priestship is of the nature of those hereditary offices mentioned in Reg.

1869.

KRISHNABHAT HIRA'GANGE v. KAPA'BHAT MAHALBHAT *et al.*

V. of 1827, Sec. 1; and, therefore, if either party had set up a title by prescription, we must, I think, have applied that law to it. If, therefore, under one state of affairs we must have treated it as immoveable, I do not see how we can treat it otherwise when applying another law to it, which law lays down no definition of immoveable property, but assuming property to be of two sorts, provides limitation for both.

When we look into the Hindú law, we find no division of property into moveable and immoveable; but those terms have been used by English writers thereon for convenience in describing certain description of property.

Nibandha is a Sanskrit word, and in Yates' Sanskrit Dictionary (Calcutta 1846) it is said to mean a grant of property, "fixed property," that is *sthávara*, or immoveable.

Mr. Justice Strange, in his Manual, which has been quoted above, states as coming under what he describes as immoveable property, "fees, or perquisites due under a permanent title, and which are designated *nibandha*" (2nd Edition, para. 139).

Colebrook in his Digest (Vol. I., p. 375, Madras Ed. 1863) describes the position of Purohita and Agrahárica priests, and says they are considered hereditary offices; while Elberling (page 96, secs. 206, 207) states that by custom these offices are considered analogous to real property.

To refer again to *Nibandha*: there is a note by Sutherland in 2 Strange II. L., pages 12 and 13, which states that *vritti* is the same as *Nibandha*, hereditary, and, therefore, treated as immoveable; and in page 363 incorporeal hereditaments are considered hereditary property.

In Stokes, Hindú Law Books, page 201, verse 9 of the Dáya Bhága, Chap. II., in discussing the difference between the property the father has power over, and what he has not, the text of Yájnavalkya is mentioned thus: "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels." Now, the three

words used in the original for land, corrody, and chattels are "*bhu*," land, "*Nibandha*," corrody; and "*Dravya*" *i.e.*, things, monies, &c. Colebrook calls it "chattels," but Strange considers it "slaves."

Now, these are the immoveable property contrasted with the moveable, in verses 22 and 23 (page 204) over which the father has power; and I think that as over the former the father's right was limited, the distinction between these two lists is the proper distinction to be made among Hindús between what in English law would be termed property moveable and immoveable, or personal and real.

I consider, therefore, that this further examination into the Hindú law books shows that the view taken by Mr. Justice Tucker and myself in S. A. No. 425 of 1866 was correct, and I entirely concur with my Lord that it requires us to apply cl. 12 of Sec. 1 of the Limitation Act to this suit, and so hold the claim not barred, and reverse, and remand the case for trial on merits.

Decree reversed and suit remanded.

Referred Case.

SHIVRUDRA'PPA' ..... July 6.

KA'SHINA'TH VISHNU ..... *Defendant.*

Practice—Order for attendance of party—Service—Civ. Pro. Code, Sec. 165.

An order under Sec. 165 of the Civil Procedure Code requiring a party to a suit to attend and give evidence may be served on such party's pleader, and need not be served personally.

CASE stated for the opinion of the High Court by M. B. Baker, Acting Assistant Judge of Dhárwár, under Sec. 28 of Act XXIII. of 1861:—

"The point to be considered is whether it was necessary that the summons issued by the Principal Ṣadr Amín, under Sec. 165 of the Civil Procedure Code, should have been

1869.

SHIVRU-DRA'PPA' v. KA'SHINA'TH VISHNU.

served on the plaintiff personally or whether service on his *vakíl* was sufficient.

"The facts of the case are these: The defendant petitioned the Court to have the plaintiff examined as a witness. A notice was served under Sec. 163 of the Civil Procedure Code, and the plaintiff put in a written statement under Sec. 164, showing cause why he should not be examined as a witness. His arguments were disallowed by the Principal Ṣadr Amín, who issued a summons under Sec. 165. This summons was served on the plaintiff's *vakíl*, who refused to accept service, urging that the summons should be served on the plaintiff personally. The Principal Ṣadr Amín ruled that service on the plaintiff's *vakíl* was sufficient under Sec. 18 of the Civil Procedure Code, and passed judgment against the plaintiff under Sec. 170 of the Civil Procedure Code.

"It has been argued on appeal that as in Sec. 163 it is laid down that the notice calling on the party to show cause may be served either on the party or his *vakíl*, and that as there is no mention of the *vakíl* in Sec. 165, therefore, the *vakíl's* agency must be considered to end with the issue of the notice to show cause, and that consequently the service of the summons must be upon the party in person. Further, that the words in Sec. 18 'for the personal attendance of the party' refer only to the attendance mentioned in Secs. 125-127, and that consequently in all cases in which a personal attendance of a party is required, except those mentioned in Secs. 125-127, personal service is necessary under Sec. 155 of the Civil Procedure Code.

"I am of opinion that service on a *vakíl* is sufficient. I think that Sec. 155 refers only to witnesses 'or other persons,' namely, persons summoned to produce documents as mentioned in Sec. 149, and would only apply to a party in a suit who was not represented by a *vakíl*. I think that under Sec. 18 service upon a *vakíl* is valid under all circumstances, as a *vakíl* represents his client at every stage of the suit. * * *

1869.

SHIVRU-DRA'PPA' v. KA'SINA'TH VISHNU.

"The appellant's *vakíl* has petitioned me to refer this case to the High Court. The question is a doubtful one, so I accede to his request."

PER CURIAM (COUCH, C.J., and GIBBS, J.):—The Court is of the same opinion as the Principal Ṣadr Amín and the Acting Assistant Judge.

Special Appeal No. 252 *of* 1869.

Aug. 9.

KUVARJI PREMCHAND *et al.* .....*Appellants.*
BA'I JAVER .....*Respondent.*

Invasion of Privacy—Custom of Gujarát—Opening of new windows overlooking a neighbour's premises.

When in Gujarát a householder's privacy is invaded by the opening of new doors and windows in his neighbour's house, his right of action is not altered by the fact that a public road runs between the dominant and the servient tenements.

Manishankar Hargovan v. *Trikam Narsi* followed.*

THIS was a Special Appeal from the decision of the District Judge of Ahmedábád in Appeal Suit No. 73 of 1866, reversing the decree of the Principal Ṣadr Amín.

Bái Javer instituted this action to cause the defendants to close four newly-opened windows,—two on the second and two on the third story, at the back of their house, which said windows overlooked the premises of the plaintiff, and the open court-yard at the entrance of her house where females bathed. The windows had been opened in 1865.

The defendants answered that there was a public road between their house and that of the plaintiff, and that no annoyance was caused to the plaintiff by the windows complained of.

The Principal Ṣadr Amín of Ahmedábád held that there was no reason shown for closing the windows. "The house of the plaintiff in this case is so low that it is not the house itself which is exposed to be overlooked from the defendants'

* 5 Bom. H. C. Rep. A. C. J. 42.

1869.
KUVARJI PREMCHAND *et al* v. BA'I JAVER.

windows; it is the open court-yard at the entrance which alone can be so seen. And though annoyance would be caused to any person who stood or remained uncovered in the open court-yard, as it was possible to see from the windows into it, yet the annoyance is not a sufficient reason to cause the windows to be closed, for the plaintiff could well prevent the annoyance otherwise."

The District Judge reversed, on appeal, the decree of the Principal Ṣadr Amín, observing, that as the windows in question were found to be newly opened windows, and caused annoyance by encroaching upon the plaintiff's privacy, they should be closed. In Gujarát, where alone this customary right obtains, it is not usual to have apertures in the back walls of houses overlooking the front of the houses on the opposite side. He relied upon the ruling in *Maṇishankar Hargovan* v. *Trikam Narsi* (*a*).

From this decision, the defendants appealed.

The appeal was argued before WARDEN and LLOYD, JJ.

Dhirajlál Mathurádás for the Appellants: The circumstances of the present case distinguish it from the case relied upon by the Judge. The Judge has omitted to determine the important issue whether the road between the two houses is a public thoroughfare or a passage to which large numbers of persons have access. In that case an issue was found "that the space between the houses was not a thoroughfare; it was not a lane which would be usually frequented by any large number of persons." In this case the passage is admitted to be a public road, about seven *gaz* broad. That the distinction between a private passage and a public road was present to the minds of the learned Judges who tried the case cited by the District Judge is apparent from the fact that they sent down this particular issue, drawing the attention of the lower Court to the distinction. In all the other cases there was no public road between the houses. Every man has a right to see

(*a*) 5 Bom. H. C. Rep. A. C. J. 42.

what passes along a public road from his window, and to enjoy the free light and air which comes from the public road; and if a private person is affected by this use of the public road he may prevent the invasion of his privacy by heightening his own wall. It is for the plaintiff to show that this customary right extends to public as well as private passages.

Nánábhái Haridás for the Respondent: The main point in this case is to see whether the plaintiff's right of privacy has been invaded by the opening of new windows and apertures. That has been found in favour of the plaintiff, and the principle therefore of the reported case cited by the Judge embraces the present one also. The right has its foundation as between neighbours, and one neighbour may not look into the secluded apartments of another, whether a public road or a private passage lies between.

Dhirajlál Mathurádás in reply: There should be at least a fuller inquiry as to the alleged custom in the case of thoroughfares.

PER CURIAM:—We see no cause to interfere with the decision of the Lower Court that the privacy of the plaintiff is invaded by the newly-opened windows. The existence of a public road between the houses makes no difference according to the custom of Gujarát. Taking the finding of the Judge that privacy has been invaded, we must confirm the decree appealed from with costs.

Decree confirmed with costs.

1869. Aug. 10.

Special Appeal No. 156 *of* 1868.

RA'MKUVARBA'I, widow of TULJA'RA'M ..... *Appellant.*
DA'MODHAR NARBHERA'M ..... *Respondent.*

Remand order—Subsequent varying decision of law—Special Appeal.

A remand order made on Special Appeal is (unless a review of it be obtained within the prescribed time) a conclusive determination of the points of law involved in it; and the correctness of law laid down upon a remand cannot be questioned on a second Special Appeal; nor is the fact of the Court's adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time for a review has elapsed.

THIS was a Special Appeal from the decision of the Assistant Judge of Thán̤á in Appeal Suit No. 569 of 1864, passed in accordance with a remand order made upon a previous Special Appeal No. 723 of 1865.

This suit was instituted in the Munsif's Court at Bassein by the plaintiff Rámkuvarbái, widow of Tuljárám, to recover from the defendant, Dámodhar, the son of Tuljárám's brother, Narbherám, a half share of the income of four temples at Nirmal, and of arrears of payment made by Government, belonging to the estate of Diválibái, widow of Jeṭhá, who was a separated cousin of Tuljárám and Narbheárm. Diválibái died in 1861 without issue, and the defendant, Dámodhar, performed her obsequies, paid her debts, and took possession of her estate.

The defendant, Dámodhar, answered that by Hindú law the plaintiff, as the widow of Tuljárám, was not entitled to inherit from Diválibái's husband, and that he, the defendant, alone was entitled as heir to succeed to the share of the deceased Diválibái.

The Munsif threw out the plaintiff's claim. In appeal the Assistant Judge of Thán̤á confirmed the Munsif's decree, holding it to be the general doctrine of Hindú law that 'the childless widow of a separated brother has no right to share in the estate of her husband's brothers.'

The plaintiff thereupon preferred a Special Appeal, No. 723 of 1865.

When the Special Appeal came on for hearing, the case was remanded on the 11th of October 1866, with the following order:—

"In accordance with the ruling in Special Appeal No. 257 of 1864 (*a*), Tuljárám, Dámodhar, and Jeṭhá being separated cousins, the immoveable property of Jeṭhá vested on his decease in possession in his widow, Diváli, for her life, and in remainder in the separated cousins Tuljárám and Dámodhar in equal shares. If Tuljárám survived Jeṭhá, so surviving, as Tuljárám died before Diváli, his vested right passed to his widow, Rámkuvar, who would be entitled on Diváli's death to claim a half share of Jeṭhá's property. The Lower Court has not found whether Tuljárám died before or after Jeṭhá, and as Rámkuvar's right depends on Tuljárám surviving Jeṭhá, the decree appealed from is reversed, and the case remanded that this point may be ascertained and determined."

In pursuance of this remand order, the Assistant Judge found that Jeṭhá died before Túlájárm, and accordingly held that Rámkuvar, the plaintiff, as widow of Tuljárám, was entitled to a half share of the property of Divalibái.

The defendant, Dámodhar, then brought the present Special Appeal from the decision of the Lower Court on remand.

The appeal was heard before COUCH, C.J., and WARDEN, J.

Shantárám Naráyaṇ for the Appellant: The ruling of this Court in Bái Jamná's case has been overruled by a later decision, and is not law: *Laksmibái* v. *Ganpat Morobá* (*b*). According to Hindú law, as now understood, no estates in remainder vest in any of the expectant heirs of a husband until the actual death of his widow.

That being so, the remand order was made under a mistaken apprehension of the law. The Lower Court in pur-

(*a*) *Jamiyatram* v. *Bai Jamna*, 2 Bom. H. C. Rep. 11, 2nd ed.
(*b*) 5 Bom. H. C. Rep. O. C. J. 128.

1869.

RA'MKUVARBA'I TULJA'RA'M v. DA'MODHAR NARBHERA'M.

suance of the remand order has held that Rámkuvar is entitled to succeed to a half share of Diváli's property. There has here been an error in law which may now be corrected.

Dhirajlál Mathurádás for the Respondent: The Court before which the former Special Appeal came went into the merits, and remanded the case to the Lower Court for the trial of issues of fact, accompanied with instructions in which the law, as it was then received, was laid down for the guidance of the Court in coming to a final determination, according as the issues of fact were found proved. That is, I submit, a conclusive determination of all points of law and fact, except the special issues to be tried on remand.

COUCH, C. J.:—The Court, on the last occasion when this case came before it, held "that if Tuljárám survived Jeṭhá, he, as his cousin, took a vested estate in remainder to come into possession after the life estate of Deváli. To this vested estate of Tuljárám his widow succeeded on his death, and so succeeding she was entitled to succeed to a half share of Jeṭhá's estate after Diváli's death along with the defendant Dámodhar." The case was accordingly remanded to the Lower Court, which found that Jeṭhá died before Tuljárám, and decided in favour of the plaintiff's claim. The remand order was made in accordance with the principle laid down in *Bái Jamna's* case, which case has been subsequently overruled. The fact that the High Court subsequently to a remand takes a different view of the law from that held at the time of the remand is not in itself a sufficient ground for questioning the validity of a remand order made by that Court under what turns out to have been a mistaken apprehension of law, or for seeking a review of it after the prescribed time. An application for a review of the remand order, within the time allowed by law, was the proper course for the appellant to have followed. Failing that, the remand order is a conclusive determination upon the point of law, and its validity cannot be questioned in special appeal. The decree of the Lower Court is therefore confirmed with costs.

Decree confirmed with costs.

1869.
Aug. 12.

Special Appeal No. 218 of 1869.

AHMED valad NANHUBHA'I .....*Appellant.*
KHA'SA'JI valad KARIMBHA'I .....*Respondent.*

Commissioner for taking accounts—Exceptions to Commissioner's Report —Power to reopen accounts—Civ. Proc. Code, Sec. 181—Act XXIII. of 1861, Sec. 37.

An error in the principle on which an account is taken is not the only ground on which a Court should inquire into the correctness of the Report of a Commissioner appointed under Sec. 181 of the Code of Civil Procedure.

It is competent to an Appellate Court, under the powers conferred by Sec. 37 of Act XXIII. of 1861, to examine the accounts, even if no exception has been taken to them in the Court appointing the Commissioner.

Madras rulings dissented from.

THIS was a Special Appeal from the decision of Arthur St. John Richardson, Judge of the District of Ahmednagar, in Appeal Suit No. 265 of 1868, reversing the decree of the Munsif of Yevlá.

The plaintiff, Ahmed, brought this action to recover a sum of money due upon an account.

The defendant denied that he was indebted to the plaintiff, and pleaded a set-off in his favour.

The Munsif appointed a Commissioner to investigate the state of the accounts between the parties, and report the result; and being, upon that report, of opinion that all the items, except one of Rs. 118, demanded by the plaintiff were held proved by the Commissioner, awarded the claim of the plaintiff, less Rs. 118.

The District Judge, without apparently referring to the Commissioner's report, went into an examination of the accounts, and found that the plaintiff failed to prove his claim. He accordingly reversed the Munsif's decree.

On the 10th of August 1869 the Special Appeal was argued before LLOYD and MELVILL, JJ.

Shántárám Nárâyan for the Appellant: The Judge should not have gone into the details of the accounts, especially

1869.

AHMI.D NANHUBHA'I v. KHA'SA'JI KABIMBHA'I.

as no objection was made to the Commissioner's report before the Munsif: *Sárápu Venkadesan* v. *Málai Isvaraiyyá* (*a*) ; *Venkata Reddi* v. *Venkataramaiyá* (*b*).

Dhirajlál Mathurádás for the Respondent: The words of Section 181 of Act VIII. of 1859 are large enough to allow the Judge, if he be dissatisfied with the Commissioner's report, to examine the accounts himself.

Cur. adv. vult.

12th Aug., 1869—LLOYD, J. :—It has been argued before us in this case that the Judge was wrong in entering into an examination of accounts which have been investigated by the Court of original jurisdiction under Section 181 of the Code of Civil Procedure, and in support of this argument the special appellant's *vákil* has cited two cases from the Madras High Court Reports.

In the former, the Court declined to take a fresh account, on the ground that to enter *de novo* on such an inquiry would entirely defeat the intention of the Legislature in framing Section 181 of the Civil Procedure Code, the object of which was to shorten and simplify the procedure of the Courts in suits relating to matters of account; and in the latter, on the same grounds, the Court declined to enter into the details of an account taken by a Commissioner appointed under the said section.

We are not prepared to endorse the opinion of the Division Courts in Madras, or to declare that an error in the principle on which an account is taken is the only ground on which a Court should inquire into the correctness of a Commissioner's report, and that then the error must be excepted to in the Court appointing the Commissioner.

The law provides that "the proceedings of the Commissioner shall be received in evidence in the case, unless the Court may have reason to be dissatisfied with them," but does not restrict the grounds of dissatisfaction ; and if the

(*a*) 1 Mad. H. C. Rep. 1. (*b*) Ibid, 418.

1869.

AHMED NANHUBHA'I v. KHA'SA'JI KARIMBHA'I.

original court can make such further inquiry as may be requisite, it is competent to the Appellate Court to do so under the powers conferred upon it by Section 37 of Act XXIII. of 1861.

In this case the Commissioner's report is dated the 25th January 1868, but was not filed until the 30th of April following, the day on which the suit was decided, so it is possible that the defendant had no opportunity of making a formal objection to the report, even if it was incumbent on him to do so.

The question then, is, had the Lower Appellate Court reason to be dissatisfied with the proceedings of the Commission. This is impossible to ascertain from the Judge's minute; for, although he has entered into a consideration of the accounts at great length, he does not say why he found it necessary to do so; nor does he refer to the report in any way whatever, and his description of the state of the accounts between the parties is wholly unintelligible. We are therefore necessitated to remand the case, in order that the Judge may find:

(1) If there is reason to be dissatisfied with the proceedings of the Commission; and (2) if so, that he may, either himself, or through a Commissioner, investigate the accounts of both parties, and pass a fresh decree on the merits of the case. Costs to follow the final decision.

Decree reversed and case remanded.

Referred Case.

Aug. 17.

HAYA'TKHA' ..... *Plaintiff.*
ABDULA'KHA' ..... *Defendant.*

Set-off—Decree.

Held, that a defendant may deny the plaintiff's claim, and also plead a set-off, and may obtain a decree for it, although no sum may be found to be due to the plaintiff.

THE following case was submitted for the decision of the High Court by Gopálráv Hari Deshmukh, Judge of

1869.
HAYA'TKHA'
v.
ABDULA'KHA'

the Court of Small Causes at Ahmedábád, under Sec. 22 of Act XI. of 1865:—

"The plaintiff has sued the defendant for a sum of money, which he alleges he had lent to the defendant. The defendant denies that he ever borrowed from the plaintiff; but, on the contrary, avers that he had lent him Rs. 58. The plaintiff objects to the set-off, stating, that, as the defendant has entirely denied the claim, he cannot plead a set-off.

"The question is whether or not a defendant, who entirely denies the claim of the plaintiff, can plead a set-off against him, and obtain a decree for it.

"My opinion is, that the defendant may plead a set-off, and obtain a decree for it, though he entirely denies the truth of the plaintiff's claim."

PER CURIAM (COUCH, C.J., and WARDEN, J.):—The Court is of opinion that a defendant may deny the plaintiff's claim and also plead a set-off, and may obtain a decree for it, although no sum may be found to be due to the plaintiff.

Aug. 17.

Special Appeal No. 226 *of* 1869.

LAKSHMIBA'I, widow of KALYA'NRA'V ANANT.....*Appellant.*

JAYRA'M HARI, RA'VJI SHRIPAT, and GANPATR'AV MAHIPAT .....*Respondents.*

*Hindú Law—Widow—*Gotraja Sapinda—Samánodakas.

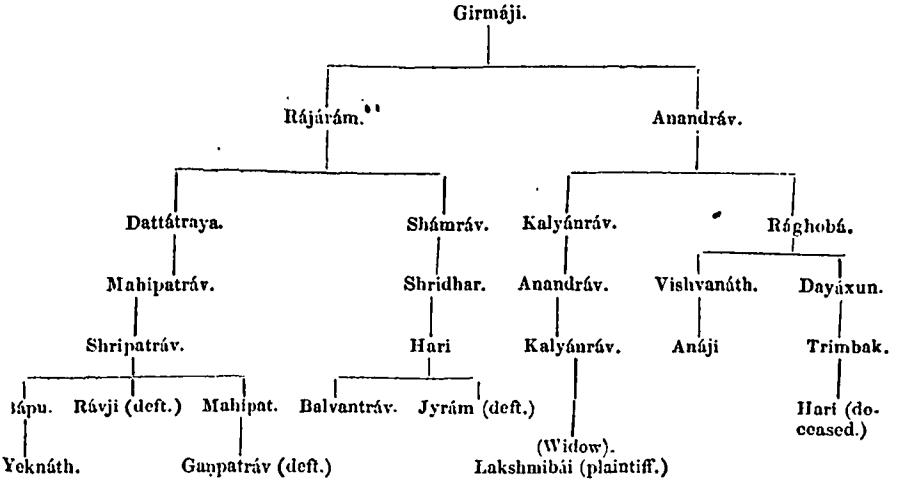
According to the Hindú Law obtaining in Western India, the wives of all *gotraja sapindás* and *samánodakas* have rights of inheritance co-extensive with those of their husbands immediately after whom they succeed.

THIS was a Special Appeal from the decision of Arthur St. John Richardson, Judge of the District of Ahmednagar, in Appeal Suit No. 285 of 1868, amending the decree of Krishṇáji Vishṇu Limayé, Principal Ṣadr Amín of Ahmednagar.

1869.
LAKSHMIBA'I v. JAYRA'M HARI et al.

The plaintiff, the childless widow of a separated member of a Hindú family, sued the defendants, also members of that family, to recover by right of inheritance property left by one Hari Trimbak.

The following genealogical tree explains the relationship between the parties to the suit to each other and to the deceased :—



The Principal Ṣadr Amín held that alî the parties to the suit were equally entitled to succeed to Hari Trimbak's property. The Lower Appellate Court, on the contrary, considered the claim of the plaintiff inadmissible.

The Special Appeal was argued before LLOYD and MELVILL, JJ., on the 6th of August 1869.

Bahiravnáth Mangesh for the Appellant: The plaintiff is the sole surviving representative of Anandráv's branch of the family. It cannot be denied that Kalyánráv was a *gotraja sapiṇda* of Hari, and a nearer relative of his than any of the defendants, who do not belong to the class of *gotraja sapiṇdas*. Had Kalyánráv been alive, he would have succeeded as heir to Hari, in preference to the defendants ; and, therefore, his widow after him should, according to the Hindú law obtaining on this side of India, succeed.

1869.
LAKSHMIBA'I v. JAYBA'M HARI et. al.

So long as there are representatives of a nearer ascendant, they, together with their wives, exclude the representatives of one more remote. In this case Anandráv is an ascendant of the fourth degree, the plaintiff, Lakshmibái, being his sole surviving descendant; while, on the other hand, Girmáji is an ascendant of the fifth degree, and the defendants are his and not Anandráv's descendants: West and Bühler, Hindú Law of Inheritance, Introduc. lii., and pp. 137—174. The same rule of inheritance holds good also with respect to *samánodakas*: West and Bühler, Introduc. liii., Widows of distant relatives succeed as heirs, Examples 170—174.

Dhirajlál Mathurádás for the Special Respondents: *Sapiṇḍás* are of two kinds, near and remote. Here the parties are remote *sapiṇḍás* of Hari Trimbak. The females of the near line of *gotraja sapiṇḍás* alone succeed; and even in that line the widow, the daughter, the mother, and the grandmother are the only eligible females; other females in this line, and all females in the line of the remote *sapiṇḍás*, are entirely excluded: Grady on Hindú Law, 221, 222, 228; Strange's Man. p. 75, sec. 310.

With reference to the line of remote *sapiṇḍás*, the Mitákshará makes no mention of females, but limits the succession to "sons and their issue": Ch. II., sec. 5, para. 5*; Coleb. Dig. Bk. V., Ch. VIII., sec. 1, para. 335. No case has been cited by the other side showing the admission of females to succession in the line of remote *sapiṇḍás*.

Bahiravnáth Mangesh in reply: The texts cited on behalf of the special respondents are law in Bengal and Madras; they are not of authority in the Presidency of Bombay.

Cur. adv. vult.

17th August—MELVILL, J.:—The plaintiff's husband, Kalyáṇráv, was the great grandson of the deceased Hari's paternal grandfather's grandfather. The defendants are fifth in descent from the father of the same ancestor. It is admitted that Kalyáṇráv, being more nearly related to Hari,

* Stokes' Hindú Law Books, p. 147.

would have succeeded to his estate if he had lived, and the only question is whether his widow is entitled to do so.

Both Kalyánráv and the defendants are *gotraja sapiṇḍás*, and the plaintiff relies mainly on the following passage in West and Bühler's Hindú Law of Inheritance, Introduction, page lii.: "On failure of the paternal grandmother, the *gotrajá sapiṇḍás*, *i.e.*, all the males of the deceased's family (*gotra*) related to him within six degrees, downwards and upwards, *together with their respective wives*, are entitled to inherit the estate of a separate householder."

On the other hand, it has been urged that this exposition of the law is without authority, and that no widow of a remoter *sapiṇḍa*, (*i.e.*, *a sapiṇḍa* who is not among the first three in direct descent or ascent) can succeed, so long as there is a male remoter *sapiṇḍa* in existence. Reference has been made to Grady on Hindú Law, p. 228, where it is laid down that "the wife, daughters, and daughter's sons, the mother and the paternal grandmother are also embraced among the *sapiṇḍás*; the female line extends no further."

This view seems to be in accordance with that held by Strange (Manual, p. 75, sec. 310) and Colebrooke (Digest, Vol. II., pp. 564—568, Madras ed., 1865), and there can be no doubt that it correctly describes the doctrine held by the Bengal and Madras schools.

But the Mitákshará is the ruling authority in the Deccan, where the present case arose, and we have to form our decision in accordance with the law therein contained.

Now the Mitákshará expressly carries the succession beyond the limit laid down in the above works. At chapter II., sec. 5., para. 5, we find the following:—"On failure of the paternal grandfather's line, the *paternal great-grandmother*, the great-grandfather, his sons and their issue, inherit." Here then the competency of the widow of a remoter *sapiṇḍa* to inherit is in plain terms recognized; and the principle having been once admitted, is carried out to its logical conclusion by the commentator Vis'ves'varabhatta in his

1869.
LAKSHMIBA'I v. JAYRA'M HARI *et al.*

Subodhini. He extends the succession to "the paternal great-grandfather's mother, great-grandfather's father, great-grandfather's brothers, and their sons; the paternal great-grandfather's grandmother, great-grandfather's grandfather, great-grandfather's uncles, and their sons. The same analogy holds in the succession of kindred connected by a common libation of water." From the mention of the great-grandfather's grandmother (*i.e.*, the wife or widow of the most remote of the male *sapiṇḍás* in direct ascent), and of the kindred connected by a common libation of water (*i.e.*, the *samánodakas*, or collaterals, within thirteen degrees) it is clear that the commentator meant to convey that by a logical interpretation of the Mítákshará, the wives of all *sapiṇḍás* and *samánodakas* must be held to have rights of inheritance coextensive with those of their husbands. This is the doctrine laid down by West and Bühler at pp. lii. and liii. of their Introduction, and discussed by them at considerable length in the introductory remarks to Digest, chap. II., sec. 14. We consider that it is the doctrine which we are bound to follow, as being drawn from the work which is the principal source of law on this side of India, and we, therefore, reverse the Judge's decision, and allow the claim with all costs on respondents throughout.

Decrees reversed and claim allowed.

Aug. 27.

Special Appeal No. 256 *of* 1869.

NA'NA'BHA'I NAROTAMDA'S .....*Appellant.*
RA'MSHET GOVINDSHET .....*Respondent.*

Special Appeal—Remand by Lower Appellate Court—Civ. Proc. Code, Sec. 351.

It is an error in law for a Lower Appellate Court to remand a case except in accordance with Sec. 351 of the Civil Procedure Code.

A Special Appeal will lie against a decree remanding a suit.

THIS was a Special Appeal from the decision of F. Lloyd, Judge of the District of Púna, in Appeal Suit No. 177 of 1866, reversing the decree of the Principal Ṣadr Amín of Púna.

1869.
NA'NA'BHA'I NAROTAMDA'S v. RA'MSHET GOVINSHET.

The plaintiff, under Sec. 246 of the Code of Civil Procedure, sued to establish his right to a house which had been attached by the defendant as the property of his judgment debtor.

The defendant stated that the house originally belonged to one Náráyaṇ, who mortgaged it to one Viṭhu, who assigned his interest in it to himself (the defendant); that after the date of this assignment one Báuji got the house sold as the property of his judgment debtor, subject, however, to the defendant's lien; that one Mulchand bought it; and that lastly the plaintiff became the purchaser thereof.

The Principal Ṣadr Amín found that the decree obtained by the defendant against his judgment debtor had been reversed on appeal, and that the parties must be relegated to their original position. He, therefore, ordered the attachment to be raised.

In Appeal the Judge was of opinion that he could not satisfactorily decide the case, without going into the question of the plaintiff's title, and he reversed the Principal Ṣadr Amín's decree, and remanded the case, in order that that title might be investigated, and a fresh decree passed.

The Special Appeal was heard before GIBBS and MELVILL, JJ.

Dhirajlál Mathurádás for the Appellant.

Shántárám Náráyaṇ for the Respondent was called upon by the Court to support the judgment of the Lower Appellate Court. He contended that as the Judge below had given no opinion, and had made no finding on the issues he had framed, his order of remand was not final, and a special appeal would not lie. It was held by this Court (COUCH, TUCKER, and WARDEN, JJ.) on the 12th April 1865, in *Subháná* v. *Bakhtá* (S. A. 85 of 1865), that a special appeal against a remand order would only lie if the order was final. [GIBBS, J.:—I am not sure that there was any such reservation in that case as you say; but, supposing that there was that reservation, was not a final decision

1869.
NA'NA BHA'I NAROTAMDA'S v. RA'MSHET GOVINDSET.

was arrived at by the Judge below.] The true test of that would be to see whether his successor could arrive at a different conclusion from that indicated in the remand order. [MELVILL, J.:—The appeal might never come again before him, and the order might therefore be final.]

Dhirajlál (*contra*) :—There is a minute in the case and a decree. These would be sufficient to satisfy the law. [MELVILL, J. :—But there is no judgment, inasmuch as there is no finding. The Judge has formed no opinion on the merits.] [GIBBS, J.:—We are sitting in special appeal. The Judge having given no decision on the merits, can there possibly be any error of law in it for us to remedy.]

Cur. adv. vult.

PER CURIAM:—We consider the District Judge was in error in reversing the decree and remanding the case to the Principal Ṣadr Amín, when he merely required the issue regarding the proprietary right of Nánábhái to be investigated. The Court of original jurisdiction not having disposed of the case on any "preliminary point" within the meaning of Section 351 of the Code of Civil Procedure, the District Judge should, under Section 354 of that Code, have sent an issue down to the Lower Court for trial, retaining the appeal on his own file. As it stands, the District Judge has passed no decision on the merits of the case in any way, and we therefore have only his final order, into the legality of which we can inquire. In this there is an error of law, as above shown with which we can deal. We may remark that we have consulted the learned Chief Justice as to the decree in Special Appeal No. 85 of 1865, and we find that no opinion, as suggested by Mr. Shántárám, was expressed which imposed any limitation to the admission of special appeals in such cases. We therefore reverse the judge's decree, and direct him to restore Appeal No. 177 of 1866 to his file, and proceed to the disposal thereof according to law. Costs to be settled in the new decree.

Decree reversed.

1869.
Sept. 7.

Referred Case.

BISANDA'S valad MAGNIRA'M *et al.* .....*Appellant.*
LAKHMICHAND KISANCHAND.....*Respondent.*

Recognised Agent—Munim—*Civ. Proc. Code, Sec.* 17, *cl.* 2.

The *munim* of a firm is not, for the purpose of presenting a plaint, the recognised agent (under Sec. 17 of the Civil Procedure Code) of a partner who is present within the jurisdiction. The *munim* and such partner should join in presenting the plaint, or appointing a pleader.

The partner's not so joining is not a ground on which an Appellate Court should reverse the decree of a Lower Court, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

CASE referred for the decision of the High Court, under Sec. 28 of Act XXIII. of 1861, by S. N. Tagore, Acting Assistant Judge of Khándesh.

The plaintiff, as manager of the firm of Jethmal Shrichand, brought this suit in the Court of the Munsif of Málegam to recover the sum of Rs. 146, due from the defendants to that firm on a bond payable by instalments, dated the 17th of December 1857.

The defendants contested the plaintiff's right to sue as manager of the firm, as Lálchand Shrichand, one of the partners of the firm, was present within the jurisdiction of the Court. The defendant also pleaded that the bond was without consideration.

The Munsif found that Lálchand Shrichand was the son of Shrichand, and one of the partners in the firm of Jethmal Shrichand; that his permanent dwelling-place was in Márwár; that he had come to Málegam about twelve or thirteen months ago, but did not transact all the business of the firm. The Munsif was, therefore, of opinion that the plaintiff had properly brought the suit as manager, and he gave a decree in the plaintiff's favour on the merits.

Against this decree the defendants appealed to the Acting Assistant Judge, S. N. Tagore, on the ground, *inter aliá*, that the manager had no right to sue as long as the principal was present within the jurisdiction of the Court.

1869.

BISANDA'S MAGNIRA'M v. LAKHMICHAND KISANCHAND.

The following is an extract from the case stated by the Acting Assistant Judge:—

"The preliminary question is whether the plaintiff, as manager of the firm, is authorised by law to conduct the suit when Lálchand Shrichand, one of its partners, is admitted to be present within the jurisdiction of the Court.

"It appears from Lálchand's evidence that the firm was owned in partnership by Jeṭhmal and Shrichand, whose names it bears, and a third person who has adopted Jeṭhmal's son; that Jeṭhmal's sons live in Márwár; that witness is the son of Shrichand, and has been residing at Málegam with his brother for the last twelve or thirteen months; that their permanent dwelling-place was also in Márwár; that when at Málegam witness transacted no other business connected with the firm except signing *hunḍis;* that in all other respects the firm was managed by the plaintiff, who has been the *munim* of the firm for twelve years.

"I am of opinion that, under the circumstances stated above, the plaintiff is not authorised to conduct the suit.

"The decision of the question turns on the meaning to be given to the words 'parties not within the jurisdiction of the Court' in Sec. 17, cl. 2 of the Code of Civil Procedure. Do they mean parties not dwelling, or parties not present, within the jurisdiction of the Court? If the former, then the Lower Court's decision is right, because the evidence shows that the residence of Lálchand Srichand within the Court's jurisdiction is only temporary, and mere presence without intention of remaining is not dwelling. I am of opinion, however, that the words are too general to admit of that interpretation, and that parties not within the jurisdiction of the Court mean parties not present within its jurisdiction."

The Acting Assistant Judge accordingly reversed the decree of the Munsif, and gave judgment for the defendants, contingent on the opinion of the High Court on the point of law whether the plaintiff (Lakhmichand Kisanchand) as manager of the firm of Jeṭhmal Shrichand was a recog-

nized agent within the meaning of the Code of Civil Procedure, as long as Lálchand Shrichand, one of the partners of the firm, was present within the jurisdiction of the Court.

The case came on for consideration on the 10th of August 1869, when it was sent down to ascertain further particulars.

It then appeared that the suit had been instituted on the 25th of January 1868, and that Lálchand's evidence was taken on the 14th August 1868.

PER CURIAM (COUCH, C. J., LLOYD and MELVILL, JJ.): —The Court is of opinion that, Lálchand Shrichand being within the jurisdiction of the Court when the suit was commenced, Lakhmichand Kisanchand was not his recognized agent within the meaning of the Code of Civil Procedure, and had not authority to present the plaint on his behalf, or to appoint a pleader for him. They should have joined in presenting the plaint or appointing a pleader; but unless the irregularity appears to have affected the merits of the case or the jurisdiction of the Court, the Appellate Court ought not on that account to reverse the decree.

Special Appeal No. 582 *of* 1868. June 15.

RA'MSHET bin BACHA'SHET ..... *Appellant.*
BA'LKRISHNA bin ABA'BHAT... .....*Respondent.*

Procedure—Special Appeal—Ex parte *Judgment in Regular Appeal.*

A plaintiff or defendant, successful in the Court of first instance, who does not appear in the Court of Regular Appeal is not debarred by such non-appearance from preferring a Special Appeal.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge of the Konkan, at Thánà, in Appeal Suit No. 148 of 1867.

The plaintiff, Bálkrishna Abábhaṭ, sued the defendants, Govind Báláji and Rámsheṭ Bachásheṭ, for possession of certain immoveable property mortgaged to him by the first defendant for Rs. 199, or to recover the amount of the

1869.

RA'MSHET BACHA'SHET v. B'ALKRISHNA ABA'BHAT.

mortgage money with interest by the sale of the property, and from the defendant, Govind, personally.

The defendant, Rámsheṭ Bacháśheṭ, answered that the house had belonged to one Náráyaṇ Rághosheṭ; that he was dead, but his son and heir lived with him (Rámsheṭ), and that, on account of such son, he had put a lock on the house; that he had taken measures to obtain a certificate of guardianship to the son; and that the defendant, Govind, had no proprietary right to the house.

The defendant, Govind Báláji, was duly summoned, but he did not put in an appearance.

The Munsif of Alibág, Thomas Taylor, dismissed the claim as against the property, but decreed that the plaintiff should recover from the defendant, Govind, the sum of Rs. 263-8-0 and all costs.

Thereupon the plaintiff appealed. In appeal the defendant, Rámsheṭ Bacháśheṭ, did not appear in support of the Munsif's decree, nor did the defendant, Govind Báláji. The Assistant Judge, deciding the case on its merits, amended the Munsif's decree, and directed that the plaintiff should recover the sum of Rs. 263-8-0 out of the mortgaged property.

The defendant, Rámsheṭ Bacháśheṭ, thereupon preferred a special appeal. A preliminary point being then taken as to whether a special appeal lay, the question was argued this day before a Full Bench, composed of COUCH, C. J., WARDEN, GIBBS, LLOYD, and MELVILL, JJ.

Shántárám Náráyaṇ for the Appellant: The ruling in special appeal, 459 of 1867, decided on the 10th October 1867, is opposed to my present contention. It is submitted, however, that that decision cannot be supported. Sec. 119 of the Code of Civil Procedure is the only section which prevents an appeal in *ex parte* cases, but that section refers to original suits. For appeals a different procedure has been prescribed by Secs. 346 and 347. Sec. 37 of Act XXIII. of 1861 says, that "unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeals which are vested in the Courts of Original

Jurisdiction in respect of original suits." It does not say that the *procedure* in appeal shall, unless when otherwise provided, be the same as in original suits, but that the Courts shall have the same *powers*. Sec. 346 of the Code provides, that if an appellant be absent on the day fixed for the hearing, the appeal shall be dismissed, and Sec. 347 allows the appellant the liberty of applying to the Court for the readmission of an appeal so dismissed; but no special provision is made to meet the case of a respondent who has not appeared to support the judgment obtained by him. This shows that his ordinary remedy of special appeal is preserved to him. Sec. 372, which gives a right to a party to prefer a special appeal from all decisions passed in regular appeal on the ground of the decision being contrary to law, &c., does not exclude the case of a respondent who did not appear below, but says that, "unless otherwise provided by any law for the time being in force," a special appeal shall lie in all cases. It is only by the application of Sec. 119 that a suitor can be deprived of his privilege to prefer a special appeal, but that section does not apply to appeals; for if it did, there would have been no necessity for Sec. 347. The practice of the Calcutta High Court allows special appeals in such cases: *Omda Bibee* v. *Acowrie Singh* (*a*), *Tara Chand Ghose* v. *Anund Chunder* (*b*).

Bahiravnáth Mangesh for the Respondent: By Sec. 25 of Act XXIII. of 1861 a special appeal is subject to all the rules provided for a regular appeal, and the Madras High Court has ruled in the case of *Devápá Setti* v. *Rámánadha Bhatt* (*c*) that the words "unless otherwise provided by any law for the time being in force," in Sec. 372 of the Code, include cases where respondents below were absent. The Calcutta High Court has ruled that a special appeal lies in such a case, but does not seem to have noticed in its decisions Sec. 25 of Act XXIII. of 1861.

Shántárám Náráyan in reply: Sec. 25 of Act XXIII. of 1861 merely shows how a special appeal is to be admitted

(*a*) 7 Calc. W. Rep. Civ. R. 425. (*b*) 10 Ibid. 450.
(*c*) 3 Mad. H. C. Rep. 109.

1869.

RA'MSHET BACHA'SHET v. BA'LKRISHNA ABA'BHAT.

and heard. But Sec. 337 of the Code shows that *all* the parties need not be before the Court in appeal; and, therefore, a plaintiff or a defendant, who does not appeal, has power to prefer a special appeal if the decision goes against him on the appeal of his co-plaintiff or co-defendant.

COUCH, C.J. :—The question before us is not without difficulty. The Calcutta High Court has held that a special appeal lies in such a case; whereas the Madras High Court and a Division Court here have ruled otherwise. I am, however, of opinion that a special appeal lies from a decision given *ex parte* against a respondent below, since Sec. 372 of the Code says "unless otherwise provided by any law for the time being in force, a special appeal shall lie from all decisions passed in regular appeal." Here the decision was passed in regular appeal, and therefore we must see whether we can find that it is distinctly provided that no special appeal shall lie in a case like the present. There is no direct provision on the point, and the argument against allowing a special appeal is founded only on Sec. 119 of the Code, which it is argued, should be applied to special appeals under Secs. 25 and 37 of Act XXIII. of 1861; but I am of opinion that neither of those sections can be held to have the effect of making Sec. 119 applicable to special appeals. Sec. 25 says that special appeals shall be subject to all the rules provided for regular appeals, so far as the same may be applicable; and Sec. 37 says that the Appellate Court shall have the the same powers in cases of appeals as are vested in the Courts of Original Jurisdiction in respect of original suits. Supposing Sec. 37 can be construed so as to empower the Court to entertain an application for rehearing the case, that will not enable us to incorporate the prohibition of appeal in Sec. 119 ; since it is one thing for the Court to say that a provision prohibits an appeal, and another that the Court has a power to do a thing. There is a marked difference between the position of a defendant who sets up no defence and produces no evidence, and that of a respondent who holds a decree in his favour. In many cases the latter may say, "I have produced all my evidence, and the law applicable to my case is

1869.

RA'MSHET BACHA'BHET v. BA'LKRISHNA ABA'BHAT.

clear, and, therefore, I will leave the matter in the hands of the Court, without going to the expense of supporting the decree I have obtained." I think there will be no great impropriety in his doing this, since he has put forward his case, and has succeeded; and, therefore, he cannot be subjected to the liability of a defendant who has not put forward any case. I agree with the decision of the Calcutta High Court, though not adopting all its reasons.

WARDEN, J.:—As one of the Judges, whose decision it is now proposed to overrule, I think it necessary to observe that, upon reconsidering the matter, there does appear to be a difference between the position of a defendant in an original suit and a respondent in appeal, and that section 119 is not applicable to appeals. I am, therefore, prepared to adopt the judgment delivered by the Chief Justice.

GIBBS, J.:—I was also a party to the decision now objected to, and I must say that I have heard little in the arguments to make me change my opinion, but from the observations made by the learned Chief Justice, I must admit that the subject comes before me in a different light. If the position of a defendant and a respondent were the same, Sec. 119 of the Code would apply equally to a case where the respondent did not appear in the Appellate Court; but I am not now prepared to say that the positions of both are alike, and I therefore think that justice requires a different decision to that at which my brother Warden and I arrived in the case alluded to in the argument, and I need say no more than that I entirely concur with my Lord in his judgment.

LLOYD, J.:—I quite concur.

MELVILL, J.:—I also quite concur.

Special Appeal allowed.

Civil Petition.

1869.
August 25.

RATANCHAND SHRICHAND .....*Petitioner.*
HANMANTRA'V SHIVBAKAS .....*Opponent.*

Appeals—Bombay Civil Courts' Act.

Held, that appeals in suits, wherein the subject matter exceeds Rs. 5,000 in value, decided before the Bombay Civil Courts' Act (XIV. of 1869) came into operation, lie to the District Courts as before the Act, and not to the High Court.

THIS was an application for permission to file an appeal in the High Court against a decree of the Principal Ṣadr Amín of Dhulia in Original Suit No. 382 of 1866. The application was the first under the new Bombay Courts' Act, and the circumstances under which it was made were briefly as follow:—

The plaintiff, who was the grandson and heir of Shivrám Rádhákisan, deceased, sued Ratanchand Shrichand, the partner of his grandfather, in the Court of the Principal Ṣadr Amín of Dhulia, for his share of the partnership profits, valuing his claim at Rs. 23,319. The Principal Ṣadr Amín decided the suit on the 29th of January 1869 in favour of the plaintiff, allowing the greater part of his claim.

The defendant applied to be allowed to appeal *in formâ pauperis* to the District Judge, who, after inquiry, refused to allow him to appeal as a pauper, but granted him further time to appeal in the ordinary way. Before this period expired the Bombay Civil Courts' Act was passed on the 19th of March 1869, and the District Judge informed the applicant that, by the new Act, appeals in suits for sums exceeding Rs. 5,000 in value did not lie to the District Court, and referred him to the High Court, which alone had jurisdiction to hear such appeals.

A petition of appeal was accordingly presented by the defendant to the High Court on the 10th of June 1869. The petition was presented to a Division Court, by which it was referred to the Full Bench, to determine whether an appeal lay to the High Court, under the Bombay Civil

Courts' Act, or to the District Court, in the case of suits decided before the passing of the Act.

The case was argued before COUCH, C.J., WARDEN, GIBBS, and MELVILL, JJ., on the 21st of July 1869.

The Honourable J. S. White (Advocate General) for the Applicant: The subject-matter of this suit exceeds Rs. 5,000 in amount, and therefore the Principal Ṣadr Amín (under the new law called a Subordinate Judge of the First Class) decided this suit in his special original jurisdiction (Sec. 25). Sec. 26 provides that appeals in such suits shall be direct to the High Court. The Act makes no express provision for appeals in suits decided before its passing, although, in Sec. 31, it reserves over all pending proceedings to the Courts of the Subordinate Judges the same jurisdiction which belonged to the Principal Ṣadr Amín, &c., under the old law, as if the Act had not been passed. While original suits, pending in the subordinate Courts are thus provided for, no provision has been made for the disposal of appeals from suits decided before the Act came into force. This omission is significant, and indicates that the Legislature intended that all appeals should be regulated by the new law.

The applicant has been guilty of no laches. He presented his first petition for leave to appeal in *formâ pauperis* in time, and the Judge thereupon granted him further time to appeal on a full stamp, rejecting his application to appeal as a pauper. Before the expiration of this further period, the District Judge, thinking he had no jurisdiction under the new Act, which came into force on the 19th of March 1869, referred him to this Court. Thirty days time is allowed by the Code to file an appeal to the District Court, and the days taken in furnishing copies of the record do not count; by this reckoning, the time for appealing to the District Court expired on the 22nd March, three days after the new Act came into operation. Neither has there been laches or delay in the presentation of the petition of appeal to this Court. The Code allows ninety days for such appeals, and the days taken in furnishing copies do not count. The time of presenting an appeal to the High

1869.

RATANCHAND SHRICHAND v. HANMANTRA'V SHIVBAKAS.

Court expired in May, when the Court's vacation commenced, and the appeal was presented when the Court first sat after vacation.

The question, then, is purely a technical one. The English cases lay down a very important distinction between rights of action and mere matters of procedure. In *Wright* v. *Hale* (*a*) Wilde, B., says: "Where you are dealing with a right of action, and an Act of Parliament passes, unless something express is contained in that Act, the right of action is not taken away; but where you are dealing with mere procedure, unless something is said to the contrary, and the language in its terms applies to all actions, whether before or after the Act, there I think the principle is, that the Act does apply without reference to the former law or procedure." Is then a right to appeal to a particular Court, a right of action, or a mere matter of procedure? If it is the latter, the Act will apply irrespective of former law or procedure to a case like the present, for there is no reservation in the law in favour of pending appeals, and the language of Sec. 26 applies to all appeals from the particular class of suits which constitutes the special original jurisdiction of a First-Class Subordinate Judge. This point has been decided in *Frámji Bomanji* v. *Hormasji Barjorji* (*b*), where it was held that the right of appeal from a Division Court of two Judges to three Judges of the High Court, preliminary to an appeal to the Privy Council, which was allowed by Sec. 14 of the old Charter, was taken away by Sec. 15 of the new Charter, which only allowed an appeal to the Privy Council, even in the case of suits pending in the High Court, and decided, but not appealed from, before the publication of the new Charter, on the express ground that a right to appeal to a particular Court was a matter of procedure; and unless something is said to the contrary, the new law, where its language is general in its terms applies without reference to the former law or procedure. The present case is exactly in point, and must be governed by the same principles.

Cur. adv. vult.

(*a*) 30 L. J. Ex. 40. (*b*) 3 Bom. H. C. Rep. O. C. J. 49.

25th August—COUCH, C. J. (after stating the facts of the case, and the general provisions of the Act as to appeals, proceeded) :—

It is clear it was not the intention of the Legislature to take away the right of appeal in any case in which it existed at the date of the passing of the Bombay Courts' Act. It is true that the existing Regulations by which the procedure in appeal was governed were repealed by that Act, but this does not necessarily take away the right of appeal. Sec. 6 of Act I. of 1868 is as follows :—"The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or *any proceedings commenced* before the repealing Act shall have come into operation."

The question is whether the word "proceedings" is sufficiently comprehensive to include a suit in which a decree has been given. We are of opinion that it is, and this opinion is in accordance with the construction of Sec. 2 of the Amended Letters Patent of the High Court, of December 1865, which was adopted by the Court in the case of *Frámji Bomanji* v. *Hormasji Barjorji* (*ubi supra*). The words of that section are "that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced after the date thereof." A suit is a judicial proceeding, and the word "proceedings" must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal. It follows, in the judgment of the Court, that in all suits commenced before the passing of the Bombay Courts' Act, the procedure must (unless another mode of procedure is expressly substituted by that Act) be the same as it would have been if that Act had not been passed. The appeal, therefore, in the case before the Court must be made, not to the High Court, but to the District Judge to whom the appeal would have lain, if the Bombay Courts' Act had not been passed.

1869.

RATANCHAND SHRICHAND v. HANMANTRAV SHIVBAKAS.

The order of the Court is, that the application to file the appeal be refused, but that the petition be returned with an endorsement directing the party to present it to the Court of the District Judge.

Application refused.

Civil Petition.

Aug. 26.

In re R. J. ABRAHAM.

Attachment before judgment—Execution of decrees in Presidency Town—Act XXIII. of 1840—*Act VIII. of* 1859, *Sec.* 81.

It is competent to the High Court, under Act XXIII. of 1840, to order a warrant of attachment before judgment issued by a Mofussil Court to be executed within the limits of the High Court's ordinary original civil jurisdiction.

THIS was an application to set aside an order made by Melvill, J., by which he directed the Shériff of Bombay to execute a warrant of attachment before judgment issued by the Assistant Commissioner of Berar, and by him sent to be enforced within the limits of the ordinary original civil jurisdiction of the High Court.

Melvill, J., endorsed the warrant, and directed it to be executed by the Sheriff of Bombay, in accordance with the provisions of Act XXIII. of 1840.

The petition came on for hearing before GIBBS and MELVILL, JJ.

Ferguson for the Petitioner: The warrant of the Assistant Commissioner is bad on its face, or at least it is one which he had no jurisdiction to issue, and which, therefore, the High Court will not endorse. The procedure of the Court in Berar is governed by the Code of Civil Procedure, and that Code, it is submitted, gives no power to Courts to attach property before judgment out of the limits of the district in which they are situated. Sec. 81 shows that the mischief to be prevented is the removal of property by sale or otherwise from the jurisdiction of the Court in which the suit is pending; for a removal of property into a foreign

1869.

In re R. J. ABRAHAM.

State does not come within its scope, unless the property is removed from the jurisdiction of the Court where the suit is pending. For instance, a man against whom a suit is pending in Tánná might remove his property from Bombay to England. Besides, no means are provided by the Code for the attaching before judgment of property out of the jurisdiction of the trying Court, though the manner in which such property is to be attached is laid down in Sec. 85; namely, the manner in which property, according to its nature, is attached in execution of a decree for money. That manner is pointed out in the set of Sections from 232 to 245, headed "Of the execution of decrees for money by attachment of property," to which Sec. 85 plainly refers. "The execution of a decree out of the jurisdiction of the Court by which it is passed" is provided for by another set of Sections, 284 to 296, to which there is no reference in the sections relating to the attachment of property before judgment. Besides, the portion of the Code headed "Of attachment before judgment" follows an almost identical set of sections, headed "Of arrest before judgment," and these latter sections make no provision for executing their process outside the jurisdiction, but contain minute directions for its execution within the jurisdiction. If the Court cannot execute the one process out of its jurisdiction, it might be argued that it cannot execute the other, seeing that the mischief to be prevented in both cases is identical. If, then, the District Courts cannot attach property before judgment in another District, there is no Act that confers upon them the power to execute such process within the local limits of the High Court. Act XXIII. of 1840 does not even purport to enlarge the jurisdiction of the District Courts; it merely confers upon the High Court certain powers which it did not before possess—that of executing the processes of the Mofussil Courts—the processes that such Courts have jurisdiction to issue. If they have not this jurisdiction *aliunde*, Act XXIII. of 1840 does not confer it upon them. If this is held to be otherwise, you have the curious anomaly in the comity of Courts all acting under a common Code of Procedure that a Mofussil Court can attach property before judgment within the local limits of

1869. the High Courts, and cannot do so within the local limits of another Mofussil Court.

In re R. J. ABRAHAM.

GIBBS, J.:—One Hardayál Govindrám brought an action against one Charles Smith in the Court of the Assistant Commissioner of Berar to recover a sum of money, and at the same time made an application, under Sec. 81 of the Code of Civil Procedure, to attach some moneys belonging to the said Charles Smith, and in deposit in the Oriental Bank Corporation, at Bombay. The application having been granted, a warrant was accordingly issued from the Court to attach those monies. In conformity with the procedure laid down in Act XXIII. of 1840, Sec. 1, for serving processes of Mofussil authorities within the local limits of the High Court in its ordinary original jurisdiction, my learned colleague endorsed the warrant, and directed the Sheriff to execute the same according to the nature thereof. In obedience to this direction, the Sheriff attached a sum of one thousand rupees, in deposit at the Oriental Bank, belonging to the defendant abovenamed.

Subsequent to the date of the attachment, two cheques, drawn on the Oriental Bank by the defendant, in favour of the petitioner, Mr. Abraham, for services rendered as attorney, were presented for payment, which, of course, was refused, and Mr. Abraham was referred to the drawer. Hence this application to set aside the attachment.

It has been contended by the learned counsel that the High Court had no jurisdiction to attach the moneys before judgment, as they were beyond the jurisdiction of the Assistant Commissioner's Court at Berar, whose warrant was therefore bad on the very face of it; and that if it were held otherwise, a strange anomaly would be the result, namely, that while the processes of the High Court would not be executed in the Mofussil, those of Mofussil Courts would be executed in Bombay.

We are of opinion that Sec. 81 of the Code of Civil Procedure, under which the warrant issued, does not require the property to be attached before judgment to be within the

jurisdiction of the Court issuing the warrant. That Section sets out two states of facts: (1) if a defendant is about to dispose of his property, or any part thereof; or (2) to remove any such property from the jurisdiction of the Court where the suit is pending, in either case the Court may direct that any property, moveable or immoveable, belonging to the defendant shall be attached. As regards the property mentioned under the first state of facts, it does not matter whether it be within or without the jurisdiction of the Court. The Code further provides that attachment before judgment shall be made in the same manner as attachment after judgment in execution of a decree for money. The procedure for enforcing attachment warrants within the town and island of Bombay is provided for in Act XXIII. of 1840. Some time ago we had to consider this Act in Chambers, and we found that it was in full operation. The order made by Mr. Justice Melvill for executing the warrant was in accordance with that Act. And the fact that the warrant to be executed was for attachment before judgment, does not, in our opinion make any difference.

It has also been contended that this is the first instance in which attachment before judgment has been asked to be executed by the Mofussil Courts. Whether that be so or not, we entertain no doubt that the Mofussil Courts have the power, under the Code of Civil Procedure, to order and direct attachments before judgments, and there is nothing shown why this Court has not power to enforce such warrants through the Sheriff within the town and island of Bombay. If the order of the Berar Court was illegal, and the defendant was not satisfied with it, it was open to him to appeal under Sec. 85 of the Civil Procedure Code. The only cases on this subject are in Perry's Oriental Cases, p. 402, *Khársedji* v. *Dádábhái*, and p. 406, case of Dharwar Process. In the former case Perry, C. J., commenting on Act XXIII. of 1840, says: "The plain object of the Act appears to me to be to prevent the frustration of justice by the jurisdiction of the Supreme Court interfering with the execution of Mofussil process over persons and property subject to the Mofussil Courts;

1869.

In re R. J. ABRAHAM.

and I think that, to carry out this object, it is the duty of this Court to be forward in lending its assistance to back any Mofussil process that may be presented to it; and I would, therefore, strive to make the act of the Judge as ministerial as possible, and would never refuse to endorse except on grounds that appear to me irresistible." In the latter case it is true the same learned Judge held that the endorsement by Queen's Judges is judicial and not ministerial, but that this was concurred in by Yardley, J., seems doubtful; and it was said to be opposed to an opinion of the then Chief Justice of Calcutta, Sir Lawrence Peel.

Without deciding whether the act of endorsement is a purely ministerial duty or not, we consider that no objection to the legality of the order has been shown, and we therefore decline to interfere.

Petition rejected.

Civil Petition.

Sept. 2.

MAHA'SHANKAR HARISHANKAR .....*Petitioner.*
VALIBHA'I UMANJI *et al*.....*Opponents.*

Extraordinary jurisdiction—Regular Suit—Reg. II. of 1827, *Sec.* 5—*Civ. Proc. Code, Secs.* 270, 271.

In cases not appealable the High Court will not usually interfere in the exercise of its extraordinary jurisdiction where the petitioner applying has his remedy by regular suit.

THIS was a petition against an order made by the Acting Senior Assistant Judge at Broach in Miscellaneous Appeal No. 3 of 1869, rejecting an appeal from an execution order made by the Munsif of Broach.

The petitioner obtained two decrees against one Bái Rájá in the Ṣadr Amín's Court at Broach, and applied for the execution of his decrees out of the balance of the proceeds of the sale of Bái Rájá's *bhág*, after satisfying the claim of an attaching creditor, Purshotam Bháishankar, who had obtained a decree against the said Bái Rájá in the Court of the Munsif of Broach, and had caused the said property to be attached and sold on the 10th of November 1868.

The Ṣadr Amín accordingly sent a notice to the Munsif's Court for execution. Six other decrees had been obtained against the same Bái Rájá in the Court of the Munsif, and the decree-holders had applied for their execution, and attached the said *bhág* on the 3rd and 21st of October 1868, before the petitioner, Maháshankar, sued out execution in the Ṣadr Amín's Court upon the balance of the proceeds of sale after satisfying Parshotam Bháishankar's claim.

The Munsif made an order that Purshotam Bháishankar's claim should be first satisfied out of the proceeds of the sale; that, after him, the six creditors should divide the proceeds rateably among themselves, as their attachment of the said property was made previous to that of Maháshankar; and, lastly, that the petitioner should, as desired by him, take the surplus, if any.

Against this order the petitioner appealed to the Judge, on the ground that Sec. 271 of the Code of Civil Procedure provided that all persons applying for the attachment of property already attached should receive rateably the balance which might remain after satisfying the original attaching creditor's claim.

The Judge disposed of the appeal on the preliminary point that the law allowed no appeal in such matters between rival decree-holders, and accordingly rejected the appeal. Against this order of the District Court, the present petition was presented, and was heard by WARDEN and LLOYD, JJ.

Dhirajlál Máthurádás for the Petitioner: There is no ground for the distinction made by the Munsif between the petitioner who applied for execution on the surplus of the proceeds of sale, and the six decree-holders who attached the property, which had been previously attached by Purshotam Bháishankar. This distinction may have existed under the old law (Reg IV. of 1827, Sec. 68), but there is no foundation for it under Sec. 271 of the Civil Procedure Code. By that section the original attaching-creditor alone has priority. The order of the Munsif works a great injustice, and on this ground the petitioner applies to this

1869.

MAHA'SHANKAR HARISHANKAR v. VALLBHA'I UMANJI *et al.*

Court to exercise its extraordinary jurisdiction. It may be the Judge could not interfere under Sec. 11 of Act XXIII. of 1861, as this was not a question between the parties. But referring the petitioner to a regular suit is, in many cases, a denial of justice.

Nánábhái Háridás for the Opponents: This is a question between rival decree-holders, and not a matter arising between the parties to the suit, and therefore no appeal lies from the order of the Munsif under Sec. 11 of Act XXIII. of 1861. In the case of *Rámchandra Náráyan* v. *Bholágir*, Rámchandra Náráyan and Bholágir were creditors of the estate of Hunt, Monet & Co., and had obtained decrees, and attached the property of the insolvent firm; the Court paid over to Bholágir money due to Rámchandra. On appeal to the Judge of the Puná District, he held that no appeal lay in such matters, and the High Court declined to interfere. There are, besides, Full Bench rulings of the Calcutta High Court to the same effect (*b*). This Court has, under Reg. II., Sec. 5, a power to call for papers and proceedings from subordinate Courts, but it cannot interfere in the exercise of its extraordinary jurisdiction in cases where no appeal is allowed by law, and the remedy of an ordinary suit is open to the parties injured. There is not in this case such a failure of proper redress as would constitute a good ground for the exercise of the extraordinary jurisdiction of this Court.

PER CURIAM:—As this is a contest between rival decree-holders, and not a matter between the parties to the suit, this Court will not exercise its extraordinary jurisdiction, for the petitioner can bring a regular suit against the other decree-holders. We accordingly reject the petition.

Petition rejected.

(*b*) See 9 Calc. W. Rep. Civ. R. 224, 514.

Special Appeal No. 274 *of* 1869. 1869. Sept. 15.

SAYAD MIYA' GULA'M NABI *et al*.....*Appellants.*
KHARANBIBI, widow of HA'FIZULA'H *et al. Respondents.*

Misjoinder of plaintiffs—Error not affecting merits of case—Procedure —Civ. Proc. Code, Sec. 350.

The misjoinder of plaintiffs, which does not produce error in the decision of the case on its merits, is not a ground for the reversal of a decree on special appeal.

Semble, that such misjoinder is not a ground for the reversal of a decree in regular appeal.

Where the widow of H., a Muhammadan, and his two daughters brought a joint suit for their respective shares of the estate of H. which were awarded to them jointly.

Held, that this was an error of procedure which did not affect the merits of the case.

THIS was a Special Appeal from the decision of C. G. Kemball, District Judge of Surat, in Appeal Suit No. 58 of 1869, affirming the decision of the Ṣadr Amín of Broach.

The suit was instituted by Kharanbibi, widow of Háfizuláh, on behalf of herself, and as guardian of her minor daughter, and by Begambibi, an adult daughter of Háfizuláh, to recover half of certain properties, together with mesne profits, from the defendants, the sons of Gulám Nabi, the brother of Háfizuláh.

Gulám Nabi and Háfizuláh were sons of Doramiyá, to whom the entire property had belonged, and from whom it descended to them. Háfizuláh died in 1861; and after his death the property, including the half share of Háfizuláh, was managed by Gulám Nabi, and after him by the present defendants, his sons. That half share the plaintiffs, Háfizuláh's widow and daughters, claimed to recover in the present suit.

The defendants answered that Kharanbibi had no authority to sue as guardian of her minor daughter, and that the suit could not be maintained, as the mother and the

1869.
SAYAD MIYA' GULA'M NABI *et al* *v.* KHARANBIBI HA'FIZULA'H *et al.*

daughters had not sued separately for their respective shares. They also pleaded limitation, want of possession, &c.

The Ṣadr Amín found that the claim was not barred; that as Kharanbibi had obtained a certificate of guardianship subsequent to the institution of the suit, there was no objection to her suing in respect of the minor's share; and that joint claims, such as formed the subject of this suit, could be allowed; and decreed in favour of the plaintiffs for the half share of Háfizuláh and portion of the mesne profits claimed.

The defendants appealed from this decree to the District Judge of Súrat.

The District Judge held that the action was not barred either in respect of the property or of the mesne profits; that the entire property had belonged absolutely to the common ancestor of the parties to the suit, and that the objection that the certificate of guardianship had not been produced by Kharanbibi before the suit commenced, could not be considered in appeal. He accordingly confirmed the decree of the Ṣadr Amín.

From this decision the defendants appealed, and the appeal was argued before COUCH, C.J., and GIBBS, J., on the 25th of August 1869.

Nánábhái Haridás for the Appellants: The Judge has not recorded a finding on all the points raised before him, as he has omitted to determine the objection relating to misjoinder. Sec. 8 of the Civil Procedure Code declares that causes of action by and against the same parties may be joined in the same suit, thereby implying that when causes of action are not by and against the same parties, such causes may not be joined in the same suit. The widow by Muhammadan law takes an eighth of her husband's estate when there are children, and the daughters, when more than one, take two-thirds of their father's property in the absence of sons. The widow and the daughters are thus claimants of distinct shares and must sue separately. The widow besides is always a legal sharer only, the daughters, though, in this case

they are legal sharers, may become residuaries also. Not only are the shares distinct and separate, but here they even claim in separate rights. The Calcutta High Court has held that Secs. 8 and 9 of the Code forbid, by implication, the joinder of causes of action not between the same parties: *Romoona* v. *Manicko Moyee Chowdhrain* (*a*). In the case of *Mussamut Ameerun* v. *Mussamut Wuseehun* (*b*) Mr. Justice Glover was of opinion that a misjoinder of causes of action was not a mere irregularity, but an illegality barring the hearing of a suit.

Cur. adv. vult.

15th Sept.—COUCH, C. J.:—The only objection raised in the special appeal is, that the claims of the plaintiffs ought not to have been joined in the same suit, as they are entitled to distinct shares of the property. We are of opinion that the objection ought not to be allowed. Sec. 372 of Act VIII. of 1859 requires that to afford a ground of special appeal the error in the procedure shall be a substantial one which may have produced error or defect in the decision of the case upon its merits. The misjoinder of plaintiffs is only an error in procedure, and frequently may not affect the trial of the suit on its merits. It always is so considered in Courts of Equity. Thus, in Story's Equity Pleadings, Sec. 544, it is said—"and in cases of misjoinder of plaintiffs the objection ought to be taken by demurrer, for if not so taken, and the Court proceeds to a hearing on the merits, it will be disregarded, at least, if it does not materially affect the propriety of the decree;" and several authorities are there referred to in support of this. And by Sec. 49 of the the 15th and 16th Vict., c. 86, the Act for the Amendment of the Practice of the Court of Chancery, it is enacted that a suit is not to be dismissed by reason only of the misjoinder of persons as plaintiffs therein.

When in the present suit the objection of misjoirder was taken before the Ṣadr Amín he might either have dismissed the suit, leaving the plaintiffs to bring separate suits, or

(*a*) 9 Calc. W. Rep. Civ. R. 525. (*b*) 12 Calc. W. Rep Civ. R. 11.

1869.

SAYAD MIYA' GULA'M NABI *et al* v. KHARANBIBI HA'FIZU LA'H *et al.*

have allowed the plaint to be amended by striking out the name of the infant plaintiff, on whose behalf a separate suit might then have been brought by the first plaintiff as her guardian. If a new suit by the widow would, in that case, have been barred by the law of limitation, an amendment of the plaint ought to have been allowed (*c*). The Sadr Amín's not doing so, would not, we think, be a ground for reversing his decree on regular appeal, if the investigation of the case on the merits had not been affected by it. It would be an error not affecting the merits of the case, and Sec. 350 would apply. But supposing that the District Judge ought to have allowed the objection, and that his not doing so is an error in his proceedings, still the Court of Special Appeal must see that the irregularity is a substantial one, which may have produced error or defect in the decision of the case on its merits; for otherwise a special appeal is not allowed. We are unable to concur in the opinion of the Court in the case which has been cited (*d*), that the Court is bound in special appeal to give effect to this objection, even although it may not be satisfied that the decision in the suit is such as involves any substantial error or defect in regard to the merits of the case; and in this case it appears to us that no error or defect in the decision of the case on the merits can have been produced. The decree must, therefore, be confirmed.

(*c*) 1 Moo. Ind. App. 485. (*d*) 9 Calc. W. Rep. Civ. R. 525.

Decree confirmed with costs.

1869.
Jan. 21.

Civil Petition.

HARI VISHNU' ..... *Petitioner.*
GOPA'L bin RA'GJI', *et al.* ..... *Opponents.*

Limitation—Execution of decree—Question raised by Court and not by parties—Appeal—Act XXIII. of 1861, *Sec.* 11.

The question whether the execution of a decree is barred by limitation is a question arising between the parties to the suit; and an appeal lies, under Sec. 11 of Act XXIII. of 1861, from a decision on such question, whether it be raised by the Court *proprio motu*, or by the parties.

THIS was an application to reverse an order made by J. R. Naylor, Acting Senior Assistant Judge at Ratnágirí.

On the 17th of August 1864 the petitioner obtained a decree against the defendants, Gopál Rágjí, and others. He now presented an application for its execution to the Munsif of Khárepáṭaṇ, who rejected the same, on the ground that it was barred by Sec. 21 of Act XIV. of 1859. The petitioner then appealed to the Acting Senior Assistant Judge, who declined to interfere, as he considered that no appeal was open to him, since the dispute was not between the parties to the suit. The following reasons, given by the Acting Senior Assistant Judge in a similar case, decided on the 26th February 1868, were certified by him in this case:—

"This is an appeal from an order passed by the Munsif of Khárepáṭaṇ upon the appellant's application for the execution of a decree. The Munsif at once rejected the application, upon the ground of its being barred by the Law of Limitation, without calling upon the judgment-debtor to show cause why the decree should not be executed. In fact, the judgment-debtor did not appear in Court at all. This, therefore, cannot be said to be a dispute arising between the parties to the suit in which the decree was passed within the meaning of Sec. 11 of Act XXIII. of 1861. It was a question that arose between the judgment-creditor and the Court, and to such questions Sec. 11 of Act XXIII. does not apply.

1869.
HARI VISHNU' v. GOPA'L bin RA'OJI', et al.

"It is a well-known rule that the right of appeal exists only where it is clearly allowed by law; and with regard to orders passed after decree, and relating to the execution thereof, Sec. 364 of the Civil Procedure Code distinctly states that: 'No Appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided.' Therefore, if Sec. 11 of Act XXIII. of 1861 (which has taken the place of Sec. 283 of Act VIII. of 1859) does not expressly provide for an appeal against orders such as that now appealed from, the present appeal certainly does not lie.

"It is not the policy of the Code to allow an appeal in every possible instance. Were it so, Sec. 364 of the Code would never have existed, and instead of the complicated language of Sec. 11 of Act XXIII. of 1861, we should have had an enactment to the effect that an appeal shall lie from all orders passed by the Court executing a decree in relation to the execution.

"What we really have, however, is a rule that 'an appeal shall lie from the orders of the Court executing a decree on all questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree.' If these words are interpreted as authorising an appeal in an instance like the present, then it appears to me the obvious meaning of the words 'arising between the parties' is lost sight of, and Sec. 11 is made to mean what, as I have already remarked it certainly does not mean, viz. 'that an appeal shall lie from all orders passed by the Court executing a decree in relation to the execution'. * * *

"The Court is, therefore, of opinion that this appeal is not one of the class expressly provided for by Sec. 11 of Act XXIII. of 1861, and therefore rejects it."

The petition was heard before NEWTON and TUCKER, JJ.

Ganpatráo Bháskar for the applicant, cited the case of *Anpurnabái* v. *Gopal Bábáji*, decided on the 19th of December 1867.

1869.
HARI VISHNU' v. GOPA'L bin RA'GJI', et al.

PER CURIAM:—The Court is of opinion that a question whether the execution of a decree is barred by any law of limitation is a question arising between the parties to the suit, and that it is immaterial whether this question be raised by the Court *proprio motu*, or by the defendant.

The Court, therefore, reverses the order of the Senior Assistant Judge, and directs that he proceed to hear the appeal.

Special Appeal No. 298 *of* 1869. Sept. 15.

POLI', Widow .....*Appellant.*
NA'ROTUM BAPU' and LA'LA' KESHA'VSHET...*Respondents.*

Hindú law—Inheritance—Priority amongst daughters.

On this side of India, having male issue does not determine the right to inherit. Comparative poverty is the only criterion for settling the claims of daughters to their father's estate. A *nidhan* (unendowed) daughter has preference over a *sadhan* (dowered) daughter.

Bakubái v. *Manchhábái* (2 Bom. H. C. Rep. 5) followed.

THIS was a Special Appeal from the decision of A. Bosanquet, Judge of the district of Tháṇá, in Appeal Suit No. 331 of 1868, reversing the decree of the Munsif of Bassein.

The action was instituted by the plaintiff, Polí, to establish her proprietory right to a one-fourth share in a field in the village of Omrale, in the talooka of Bassein, which had belonged to her father Lakshuman, deceased, and which the first defendant had attached and sold in execution of a decree obtained against one Dámá Poput, the husband of the plaintiff's sister. The second defendant purchased the property in dispute at the auction sale. The plaintiff claimed as sole heir to her deceased father.

The defendants set up the title of their judgment-debtor, Dámá Poput, in right of his wife, the plaintiff's sister, who died after her father, leaving a son, and contended that a daughter with a son had a preferential claim to succeed as heir to her father over a daughter who was a childless widow, as the plaintiff was.

1869.
POLI', Widow, v. NA'ROTUM BAPU' and LA'LA' KESHA'VSHET.

The Munsif of Bassein found that after Lakshuman's death, the plaintiff succeeded to the property in dispute as his heir, and that Dámá managed it as trustee for the plaintiff, and decreed in favour of the plaintiff.

The first defendant appealed from this decision to the District Court, on the ground that the share claimed belonged to Dámá in right of his wife, and that at the time of the sale it was in his possession as owner, and not as trustee for the plaintiff.

The District Judge held that, according to Hindú law, among daughters the unmarried take first, and after them the married daughters having male issue. Dámá's wife accordingly, as a daughter having male issue, was heir to Lakshuman in preference to the plaintiff, a childless widow. The District Judge accordingly reversed the decree of the Munsif.

The appeal was heard before COUCH, C.J., and MELVILL, J.

Dalpátrám Jivánrám for the appellant.

COUCH, C.J.:—The circumstance of having male issue does not, on this side of India, determine the right to inherit. The case of *Bakubái* v. *Manchhábái* (*a*), settled this point definitely. Comparative poverty is the only criterion of settling the claims of the daughters among themselves. An (*nirdhan*) unendowed daughter has preference over an (*sadhan*) endowed daughter. The decision of the District Judge is accordingly reversed, and the suit is remanded for retrial, in accordance with the principle laid down in the leading case.

Decree reversed and suit remanded.

(*a*) 2 Bom. H. C. Rep. 5.

1869.
March 24.

Regular Appeal No. 1 *of* 1868 *under Act X. of* 1866.

JAMIYATRA'M HIMMATRA'M ..... *Appellant.*
THE GUJARA'T TRADING COMPANY, LIMITED. *Respondents.*

Appeal—Winding up of Company—Act XIX. of 1857, *Act X. of* 1866.

No appeal lies from an order of a District Court placing the name of an alleged allottee on the List of Contributories of a Company wound up under Act XIX. of 1857.

THIS was an appeal from an order of Baron De H. Larpent, District Judge of Ahmedábád.

The appeal came on for hearing on the 15th March 1869, before WARDEN and GIBBS, JJ.

Nánábhái Haridás, for the respondent, took a preliminary objection that the order winding up the Gujarát Trading Company was made by the District Judge of Ahmedábád on the 15th of September 1865, under Act XIX. of 1857, which did not provide for an appeal.

Dhirajlál Mathurádás, for the appellant, contended that the order directing appellant's name to be retained on the list of contributories had the force of a decree, and as such came within the spirit of Sec. 23 of Act XXIII. of 1861, and that the prohibition as to appeals against orders in Sec. 364 of the Code of Civil Procedure did not extend to an order of this nature.

Cur. adv. vult.

24th March—GIBBS, J.:—This is an appeal against an order passed by the District Judge of Ahmedábád directing appellant's name to be entered on the list of contributories to the Gujarát Trading Company, then being wound up by that District Court.

The appeal is met in the first instance by an objection that no appeal lies.

It is admitted that the order for the winding up, dated 15th September 1865, was made under Act XIX. of 1857, and not under Act X. of 1866, which had not then been passed; and it is clear that there is no provision in that Act

1869.

JAMIYATRA'M HIMMATRA'M v. THE GUJARA'T TRADING COMPANY.

for any appeal. The Act is very meagre, and consists of only 105 sections; whereas Act X. of 1866 gives detailed instructions on almost all the points, and contains 231 sections, and in Section 141 makes provision for an appeal.

Under Sec. 221 of Act X. of 1866 it is provided that, "where previously to the commencement of this Act an order has been made for winding up a Company under any Acts or Act hereby repealed, such Company shall be wound up in the same manner and with the same incidents as if this Act were not passed, and for the purposes of such winding up, such repealed Acts or Act shall be deemed to remain in full force."

I think, therefore, that it is clear that Act X. of 1866 is not applicable to this case, which must be determined by the provisions of Act XIX. of 1857, and this latter enactment does not contain a provision for appeal.

The District Judge would appear to have followed Act X. of 1866, at all events in its language, after it came into operation; and it might be said that the order is one which could not be made under Act XIX. of 1857, as that Act contains no such formal authority as Sec. 119 of Act X. of 1866 to authorize the Court "to settle a list of contributories," and that therefore the order is null and void in itself. It is clear that under Act XIX. of 1857 no such express provision is made; but it is enacted that the Court, after making the order for winding up, shall have power to make calls (Section 79) if necessary "on all or any of the contributories, to the extent of their liability;" and who are contributories is defined in the 64th Section, and their liabilities set out in Sections 60, 61, and 62; so that it would appear to be necessary to settle a list, in order to issue the notice of call with the amount to be paid. Section 80 also states that the order for the payment of a call shall be of the same force as a decree.

I consider that under Act XIX. of 1857, that step which is especially provided for in Section 119 of the later Act (Act X. of 1866), is only a portion of the procedure required

to be gone into before making the call, and merely preliminary thereto.

The Act being silent as to an appeal, I do not think one will lie. It has been urged before us that, although no provision is made for an appeal by the Act, still the general law which provides for appeals from all decrees from a District Court will meet the case; Act XXIII. of 1861, Sec. 23, is quoted in support. The words of this section run thus: "Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorised to hear appeals from the decisions of those Courts."

I have above noticed the nature of the order appealed against; and as I do not think, under any circumstances, it can be considered a decree, or to have the force of a decree (whatever an order for a call might have), it is not appealable under Act XXIII. of 1861.

It was further urged that we might deal with the case under our extraordinary power given by Regulation II. of 1827, Section 5.

I do not see any cause made out for such an application in the papers before us; but until it is placed in the form required by our rules we are not called on to give any formal decision on the matter.

Under the view I have taken I would dismiss the appeal, on the ground that no appeal lies from such an order.

WARDEN, J., concurred.

Appeal dismissed.

1869.
Sept. 15.

Special Appeal No. 295 *of* 1869.

GOVIND PURSHOTAM KOLA'TKAR .....*Appellant.*
THE SUB-COLLECTOR and DEPUTY CONSERVATOR OF FORESTS OF COLABA .....*Respondents.*

Timber trees—Title of occupier to trees growing upon his land—Bombay Act I. of 1865, *Sec.* 40.

The occupier of land who does not come under Sec. 40 of the Bombay Survey and Settlement Act 1865 has not, in the absence of agreement, any proprietory right to the trees growing on his land.

THIS was a Special Appeal from the decision of A. Bosanquet, Acting District Judge of Thánáṇ, in Appeal Suit No. 90 of 1868, confirming the decree of A. Lyon, Assistant Judge, in Original Suit No. 9 of 1867.

The plaintiff in the original suit brought this action to have his right of property established in several teak and other trees in four fields (Survey Nos. 51, 57, 61, 62), which he held under assessment from Government in the village of Bellowlee. On the 18th of January 1867 the plaintiff received an order from the defendants forbidding him to cut the trees.

The defendants answered that the plaintiff had no right of property in the trees claimed, as the trees, teakwood and blackwood, being timber trees, were the property of Government. The plaintiff alleged that he held the land on which the said trees grew from the time of Mr. Dunlop's proclamation, and that the lands were within the limits to which it extended.

The proclamation ran, when translated, as follows:—

Proclamation of the Honorable Company Bahadar, by J. A. Dunlop, Esq., Collector and Magistrate, Zillah Southern Concan.

It is hereby proclaimed, for the information of all, that it has been the practice hitherto for the Government to claim all teak, sisur, and other timber trees within the limits of the zillah, even when growing on private lands, on which account people were discouraged from preserving and rearing these timber trees on their lands. The Government having heard this, and bearing in mind that all people will be much benefited by the rearing and cultivation of teak, sisur, and other trees in the country, hereby proclaim, for the information of all, that, exclusive of the Government forest in the Sawera táluká and Malvan táluká, whoever may have teak and

other trees growing on their land outside these limits will be exempted from all claims on the part of Government. Those who are the owners of trees, or who will hereafter raise them on their private land, will be allowed to dispose of them according to their pleasure. No obstruction will be caused on the part of Government.

Dated 1st *March* 1824.

The Assistant Judge found that the plaintiff had no right of property in the trees. The allegation of long enjoyment as owner of the land and the trees he held not established by the evidence adduced, which only went to show that the plantiff has paid assessment since 1852-53. As continuous enjoyment for more than twenty years was not established, the Assistant Judge held that the plaintiff could not take the benefit of the proclamation issued by Mr. Dunlop, nor could he claim the benefit of Rule 10 of the Survey Joint Rules.

The plaintiff appealed from this decree to the District Court. The District Judge held that there was no satisfactory evidence "that plaintiff had any right of occupancy in these lands before 1852; and this being the case, that the Assistant Judge was right in ruling that the plaintiff could not take the benefit of Mr. Dunlop's proclamation." He accordingly confirmed the Assistant Judge's decree.

The appeal was argued before COUCH, C. J., and MELVILL, J.

Shántárám Náráyaṇ for the appellant:—The presumption of ownership in the trees is in favour of the holder of the land in which the trees grow. The lands have been held by the plaintiff ever since 1852, and even earlier, on condition of paying the survey assessment. By Sec. 40 of Act I. of 1865 it is enacted that "permission to occupy land shall in all future settlements include the concession of the right of Government to all the trees growing on that land, which are not then specially reserved." The plaintiff is admittedly an occupant or holder of the land under Government, and has thus, under Sec. 40 of Act I. of 1865, an absolute right to the trees growing on his land, unless, indeed, there was any special reservation on this head, which has not been shown. On the contrary, this land formed part of the lands in Southern Concan, to which District Mr. Dunlop's procla-

1869.

GOVIND PI BEHOTAM KOLA'TKAR v. THE SUB-COLLECTOR and DEPUTY CONSERVATOR OF FORESTS OF COLABA.

mation applies. By the proclamation Government expressly abandoned all their right to the teakwood and other timber trees growing on private lands not included in the limits of the forests reserved. That proclamation was intended to encourage the cultivation of timber trees, which had been much neglected before on account of this right of interference on the part of Government. There had thus in this case been a complete waiver of any right to the teak and timber trees growing on these lands on the part of Government, and now, by express legislation, occupancy rights in land include a right to the trees. The Lower Courts drew an unwarranted inference from the fact that the plaintiff appears to have paid the assessment on the land only since 1852. In 1852 the survey operations commenced in this part of the country. Before that year much waste land, attached to lands under cultivation, was enjoyed by the cultivating tenants without being entered in the assessment books. All such lands were assessed for the first time in 1852, and hence the reason of the entries in the receipt-book commencing with that year. No presumption against prior possession can be reasonably drawn from the absence of such entries, a mistake which has misled both the Lower Courts.

Dhirajlál Mathurádás for the respondents:—The finding of the Lower Courts that possession dates from 1852 downwards is a finding on facts, and cannot be controverted. Sec. 40 of Act I. of 1865 applies to unoccupied assessed lands which are taken up for the first time; in which case the concession of the trees will be deemed to be included in all *future* settlements. The section, therefore, cannot apply to the present case. The new Survey Act in Sec. 3 confirms all the previous settlements. Government does not part with its right to the ownership of the lands when it lets them to the ryots to cultivate for one or more years. The occupant ryot has no proprietory interest in the land. The survey joint rules expressly require that the holding must exceed twenty years to confer a right to the trees. The proclamation of 1824 also does not protect the present plaintiff, as both the Courts below have held.

1869.

GOVIND PURSHOTAM KOLA'TKAR v. THE SUB-COLLECTOR and DEPUTY CONSERVATOR OF FORESTS OF COLABA.

COUCH, C. J.:—This is a case between landlord and tenant. There is nothing to show that the tenancy confers any other right than that of occupying and cultivating the land for thirty years, as guaranteed by the settlement. Were it otherwise, the tenant might cut down the timber trees in one year, and throw up the land the next year, for nothing prevents his doing so. The thirty years' term restricts the power of the Government to alter the assessment, but in no way enforces a continued occupation of the land upon the tenant while the term lasts. The trees are timber trees growing on Government land, and the proprietory right to the trees is derived from the property in the land.

MELVILL, J., concurred.

Decree affirmed with costs.

Regular Appeal No. 9 *of* 1868. Sept. 30.

VA'MAN JANA'RDAN JOSHI .....*Appellant.*

THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS .....*Respondents.*

Sanad—*Construction*—Inámdárs *right to cut timber*—*Prescriptive title.*

In construing grants by former governments, the rule of English law as to the construction of grants to a subject by the Crown is the correct rule to be applied by the Courts in India.

Where a *sanad* contained only the words "the village of Mánávali has been conferred on you as *inám*, to be enjoyed by you, your son, and grandson. The government dues of the village, viz., the *koolbab koolkanoo* (*i.e.*, all taxes, and assessments), present taxes, and future taxes, together with the house-tax, but exclusive of *haks* due to *hakdárs*, shall continue to be debited from year to year, from the year next succeeding."

It was *held* that the plaintiff's *sanad* did not operate as an alienation of the *soil* of the villages, or confer on him a proprietory title in it, and therefore gave the plaintiff no right to the timber growing upon the soil.

The holder of such a *sanad* having only a right in the revenues and none in the soil of the village, cannot, by thirty years user, become the proprietor of the timber.

THIS was an Appeal from the decision of Arthur Bosanquet, Judge of the District of Tháná, in Suit No. 8 of 1867.

The facts of the case are briefly these:

1869.

VA'MAN JANA'RDAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

The government of A'ngriá, by a grant dated 1749-50, conferred upon the plaintiff's ancestor a village called Mánávalí, situated in táluká Kallián, as *inám*. This grant was confirmed by the government of the Peshvá in 1798-99. In the year 1855 the defendants ordered the plaintiff not to interfere with the forests in the village, and took upon themselves the conservation thereof. The plaintiff, feeling aggrieved, brought this suit to establish his exclusive right to the forests, and to restrain the defendants from interfering with his management of them. The defendants pleaded, *inter alia*, that the grants under which the plaintiff claimed gave him no right to the forests.

The operative words of the grants are set out in the judgment of the Court.

The District Judge gave a decree in favour of the defendants, against which the plaintiff preferred an appeal to the High Court.

This appeal was argued before GIBBS and MELVILL, JJ., on the 29th July and 9th August 1869.

Shántárám Náráyaṇ for the appellant.

Dhirajlál Mathurádás (Government Pleader) for the respondents.

Cur. adv. vult.

30th September—MELVILL, J.:—The points for determination in this case are:

Whether the plaintiff has a title by grant to the forest which he claims.

If not, whether he has acquired such a title by prescription.

In construing the grant on which the plaintiff in this case relies, the Court below has applied the rule of English law that "a grant from the Crown is construed most strictly against the grantee, and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words."

It has been urged upon us in appeal that rules of English law are not applicable in this country, and that this particular rule is oppressive and unjust. I will briefly consider if it is so.

The British Government, having bound itself to respect all grants made by former governments, the application of this rule would be oppressive if it involves a harsher mode of construction than would have been applied under the native governments, by whom the grants were made. And if this be not the case, it is still not such a rule as should be applied if it be in any way opposed to justice, equity, and good conscience.

First, then, does the rule in question involve a harsher method of dealing with grants than would have been adopted by the governments by whom such grants were made?

"In this country," wrote Sir Thomas Munro, "under the native governments, all grants whatever are resumable at pleasure; grants for religious and charitable purposes to individuals or bodies of men, though often granted for ever or while the sun and moon endure, were frequently resumed at short intervals; grants of *jágír* or *inám* lands from favour or affection, or as rewards for services, were scarcely ever perpetual. It made usually little difference whether the grant was for no particular period or perpetual; the (*altamghá*) perpetual grant was as liable to resumption as any common grant containing no specification of time; it was resumed because it was too large, or because the reigning sovereign disliked the adherents of his predecessors, and wished to reward his own at their expense, and for various other causes. There was no rule for the continuance of grants but his pleasure; they might be resumed in two or three years, or they might be continued during two, three, or more lives; but when they escaped so long, it was never without a revision and renewal. I believe that the terms of their lives is a longer period than grants for services were generally permitted by the native princes to run."

Mr. Elphinstone,* speaking of alienations, says: "The power to interfere for the protection of subordinate rights was, however, retained by the Government, as well as a claim to any revenue which the tract assigned might yield beyond

* History of India, Vol. I., p. 142.

1869.

VA'MAN JANA'RDAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

the amount for which it was granted." The second of the two *sanads* produced by the plaintiff in this case shows that such a claim was in fact made upon his ancestor, though subsequently remitted.

The quotations which I have made are, I think, sufficient to show that if the Peshvá had had to decide whether the plaintiff is entitled under the terms of his grant to the forests, which at the time of the grant were valueless, but have since become most valuable, he would have been guided by a rule of construction even less indulgent to the plaintiff than the rule which the Judge of Tháṇá has borrowed from English constitutional law.

The second and more important question is, whether the rule is in accordance with justice, equity, and good conscience. I think that it is so in the highest degree. In England the rule doubtless had its origin in the reverence of the Courts for the person and prerogative of the King; but I prefer to base it on a yet higher principle, and to consider it only in its bearing upon the public good.

"No man made the land, or the trees which naturally grow thereon. They are the original inheritance of the whole species." The King possesses them only as the representative and trustee of the people. He may be vested with power to alienate the property of the people; and there may be circumstances which justify him in doing so. Public services may be rewarded by public gifts. But any such alienation is a loss to the community, and the public good requires that it should be jealously watched and restricted. If it has been made, it must stand good, even though it be an injury to the community for all time; but it is not to be presumed that it has been made; nor is it to be allowed out of any feeling of indulgence for the individual; on the contrary, it should be sternly withheld, unless it has been expressly granted.

Something has been said during the arguments in this appeal (and in such cases something of the kind always is said) as to the harsh and tyrannical interference of Govern-

ment with the rights of private property. It seems to be forgotten that the Government which granted those rights (if indeed they have been granted) would not have hesitated to resume them; and it seems to be forgotten that the British Government, in seeking to restrain such rights within the narrowest possible limits, is not acting for any selfish end, but as the representative of the people, and for the good of the people.

If a strong sense of justice induces the British Government to give effect to all the improvident grants of former princes, it is surely right that it should not extend the mischief further than it need, and that it should refuse to recognise any claim which is not clearly supported by the grant.

The above considerations present themselves in the present case in the strongest possible light.

The question at issue is, whether an *inámdár* holding a *sanad* from the Peshvá is entitled to deal as he pleases with the forests. The importance of the question can hardly be overrated. The climate of a country, the rainfall, the fertility of the soil, are all affected by the preservation or destruction of its forests. The extension of railways is one of the great necessities of this country; and one of the chief obstacles to the rapid construction of railways is the scarcity of timber, produced by long years of neglect and improvidence. It may therefore be said that the parties to this suit are, on the one side the public, insisting on the intelligent conservation of the forests for the public good; on the other side an individual claiming to waste one of these forests as he pleases, on the ground that it was given to his ancestor, not for any great services to the public, but "in consideration of his being a venerable excellent family man, and for his treatment of the Bráhmans passing through the village."

In a contest of this kind it is surely most just that such a rule as that by which English Courts of Law are guided in the construction of grants from the Crown should be applied in the most stringent possible manner; and that the plaintiff's

1869.

VA'MAN JANAR'DAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

sanads should not be construed as conferring a right to the forests, unless such right be conferred in clear and unambiguous terms.

I do not go so far as to say that the word "forests" need be found in the *sanads*. It will be sufficient if the *sanads* show plainly and unequivocally that the proprietorship of the land of the village was granted to the plaintiff's ancestors; for the owner of the land is owner also of the timber which grows upon the land.

I proceed now to consider the terms of the two *sanads* produced by the plaintiff as evidence of his rights.

The first is a *sanad*, from A'ngriá, which was granted A.D. 1749-50. The operative part of this *sanad* is as follows:— "Your maintenance and protection in every way having been deemed conducive to the happiness of His Majesty, the village of Mánavlí, Tarf Wánkhal, Sobha Kallián, has accordingly been conferred on you as *inám*, to be enjoyed by you, your son, and grandson from generation to generation. The government dues of this village, viz., the *koolbab koolkanoo* (*i.e.*, all taxes and assessments), present taxes, and future taxes, together with the house-tax, but exclusive of *haks* due to *hakdárs*, shall continue to be debited from year to year from the year next succeeding. You are to enjoy the *inám* grant of the said village hereditarily without disturbance."

The second document is from the Peshvá, and bears a date corresponding with A.D. 1798-99. It is addressed to Sadásiv Bháskár, a government official, probably mámlatdár of the district.

After reciting that half the village of Mánavlí had been granted to an ancestor of the plaintiff by A'ngriá, and that the grant had been confirmed, and that the other moiety of the village had been granted by a *sanad* from a former Peshvá, which had been destroyed by fire, and after some further recitals which it is immaterial to consider, the *sanad* proceeds as follows:—

"Therefore the whole of the aforesaid village *koolbab koolkanoo*, excepting the (*haks* of the) *hakdárs*, and ancient

inámdárs, having been from the present year granted in *inám* as before to the Bhátji, in consideration of his being a venerable excellent family man, and for his treatment of the Bráhmaṇs passing through the village, this *sanad* is herewith forwarded to you.

"The village should therefore be continued to him as an *inám* grant, and the revenue of the said village, including that of Kusbá Chowk, should be entered in the táluká account to the debit of the Joshi, on account of *inám*."

The last of these documents is that on which the plaintiff's title rests, and it is therefore that to which my consideration must be mainly, if not entirely, directed.

What is the meaning of the words "the whole of the aforesaid village *koolbab koolkánoo?*" The words are all in the same case, and there is no conjunction between any of them. It seems to me that they are open to two interpretations. They mean either "the ownership of the village, together with the right of levying taxes and assessments," or "the ownership of the village *so far as relates* to the right of levying taxes and assessments." Here is an ambiguity which should, if possible, be explained by the rest of the document.

The announcement of the grant having been made, the *sanad* goes on to direct how effect is to be given to it. The amount of the revenue of the village is to be debited to the grantee in the Government records. I do not wish to import into this judgment any knowledge of my own as to the manner in which the revenue records were kept under the Peshvá's government. I will, therefore, refer to a book which may, I think, be admissible as an authority on this subject. Mr. Grant Duff, in his history of the Mahrattas (Indian Reprint, vol. I., p. 26), says, describing the practice under the native government:—"It is the business of the kúlkurní to keep all public accounts, which are made up annually. In his general account the whole of the land is first stated; then the commons, roads, the site of the village, and all waste land incapable of cultivation, are deducted. The arable land is next shown, and alienations of every

1869.

VA'MAN JANA'RDAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

description specified. The remainder is the land on which the government assessment is levied." Now, under this system, what would have been the effect of the directions given by the Peshvá. Simply, as it appears to me, that the village would have been entered in the government records as continuing to be the property of government, but on the debit side of the account there would have been an entry showing that the amount of the taxes and assessments had been alienated to the grantee. In other words, the accounts would have shown nothing more than that the right to the government revenue had been alienated. It seems to me that this suggests a strong inference that nothing further was intended.

I will now turn to A'ngriá's *sanad*, for there seems reason in the plaintiff's argument that the Peshvá evidently did not intend to take away anything which had been granted by A'ngriá, and, therefore, if A'ngriá's *sanad* contains any plain declaration that the absolute proprietorship of the village was granted, the plaintiff will be entitled to the benefit of such declaration. That *sanad* states, without any qualification, that "the village has been conferred on you as *inám*." But immediately after it goes on to say: "The government dues of this village, namely, the *koolbab koolkanoo*, &c., &c., shall continue to be debited from year to year from the year next succeeding." Now this was a *sanad* given to the grantee, not a direction to the person in charge of the accounts. What possible reason could there be for telling the grantee what entries would be made in the government records? It seems to me that these words are only intelligible on the supposition that they are intended to define the extent and meaning of the preceding words. The whole passage must be construed thus: "The village is given to you as *inám* to the extent of authorising you to take the government dues, which will accordingly (as evidence of your right) be debited to you in the government accounts."

Looking only to the contents of these two documents, I think that the most reasonable construction under any circumstances is that which I have adopted, and, *à fortiori*,

is it the construction which should be adopted in a case in which the grant is to be construed most strictly against the grantee.

In a very learned judgment on the subject of *ináms* in the case of *Krishnarav Ganesh* v. *Rangrav* (*a*), WESTROPP, J., says: "*Sanadi* grants in *inám*, *sáranjam*, *jágír*, *wazifá*, *wakf*, *devasthán*, and *sevasthán*, are, generally speaking, more properly described as alienations of the royal share in the produce of the land, *i.e.*, of land revenue, than grants of land, although in popular parlance, and in this judgment, occasionally so called."

I believe that this is perfectly accurate, and that, unless a *sanad* contains words expressly granting the ownership of the soil, it must be held that the ownership of the soil was not granted.

The defendant has put in three *sanads* to prove that when the right of cutting timber was intended to be granted, the word "trees" was expressly inserted. I think these *sanads* show even more than this. In addition to the words contained in the plaintiff's title-deeds granting the taxes and assessments, there is in these *sanads* a further grant of "water, trees, grass, wood, stone, and buried or concealed treasure." WESTROPP, J., in his judgment, above quoted (page 22), refers to another *sanad* of the same kind. Now, what would be the meaning of these additional words, if the previous words, which are the same as those of the plaintiff's title-deeds, were sufficient to transfer the proprietorship of the village? They would be simply idle and foolish. "The soil of the village is granted to you absolutely; and in addition to this you may take the water, trees, grass, wood, and stone." Can such a construction be admitted for an instant? How could a man have the soil of the village, and not have the right to use the water and the grass? The Peshvá must have known as well as Blackstone that "the word land includes not only the face of the earth, but everything under it or over it; and, therefore, if a man grants all his lands, he

(*a*) 4 Bom. H. C. Rep., A. C. J. 1

1869.

VA'MAN JANA'RDAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

grants thereby all his mines, his waters, and his houses, as well as his fields and meadows." The truth is, these additional words were not mere surplusage, but were the very words which conferred the proprietorship of the village, the words which preceded them conferring no more than the right to take the government dues. The addition of these words in this class of *sanads* is not more suggestive than the omission of any words regarding the entries to be made in the government records. When a village had once been granted absolutely, there would be no occasion to enter all the details which were usually shown in the government accounts when only the government revenue was alienated, and therefore in this class of *sanads* no allusion is made to the subject.

We have been referred by the plaintiff's pleader to the case of *Ruttonji Edulji Shet* v. *The Collector of Thán'á and the Conservator of Forests* (*b*), which came before the High Court in Regular Appeal No. 12 of 1863, and was finally decided by the Privy Council. In that case the plaintiff, who held a lease of land from Government, claimed the right of cutting timber. His claim was disallowed in all the Courts. In the judgment of the High Court is the following passage:—"In the *kowl*, or, as it may more properly be termed, *sanad*, relating to the *inám* village of Hariálee, from which extract D is taken, we find that, independently of the most comprehensive expression, *jaltarú, trun, pásh'an, nidhi nikshep* (water, trees, wood, grass, and stone, and treasure-trove) used in that document, after the fashion of similar grants both under the late and the present Government, an express clause has been inserted to permit the *inámdár* to cut timber in the forests of his village. If, therefore, an *inám* grant, with the comprehensive expression above referred to, will not, without an express provision, operate as conveying any rights over the forests in the *inám* village, how much less could the effect of a lease silent on the point be in passing such rights to a lessee."

The opinion of the Court in that case therefore was, that even the comprehensive words quoted by them did

(*b*) 10 Calc. W. Rep. P. C. 13

not necessarily give the right of cutting timber; so that there can be no doubt that the Court would have held that the omission of such words would necessarily negative such right.

The Privy Council, while confirming the decision of the High Court, did not refer to that portion of their judgment which I have quoted. They simply held that, as a lessee, the plaintiff had no right to cut timber, because "the trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land." These are the words upon which the plaintiff's pleader relies, and they are certainly sufficient to maintain the proposition that if the plaintiff be the proprietor of the land he has a right to the timber. But it is this very fact of proprietorship which, in my opinion, he has failed to establish; and therefore, the judgment of the Privy Council does not help him.

As regards the first question for consideration therefore I find that the forest over which the plaintiff claims to exercise rights of ownership was not granted to him by the *sanad* under which he claims.

The second question raised by the plaintiff in appeal is, whether by long enjoyment he has acquired a prescriptive right to the forest.

I have no doubt that such a claim cannot be maintained. It is perfectly true that the Peshvá's government, and, until within a very recent period, the English Government, have allowed persons to cut timber in the government forests with scarcely any restriction. I have no doubt the plaintiff has, for more than thirty years, been allowed to cut timber in the Mánavlí forest, and it is very possible that, as he alleges, he gave permission to other persons to cut timber in that forest. But, granting that such a user has existed to the full extent alleged by the plaintiff, it would not make the plaintiff the proprietor of the soil, and if it do not make him proprietor of the soil, it cannot make him proprietor of the trees, which belong to the owner of the soil. The only right

1869.

VA'MAN JANA'RDAN JOSHI v. THE COLLECTOR OF THA'NA' and THE CONSERVATOR OF FORESTS.

which can have been created is of the nature of what is termed a servitude or a right of profit à prendre *in alieno solo.* Now, it is certain that there can be no prescriptive right in the nature of a servitude so large as to preclude the ordinary uses of property by the owner of the land affected by the privilege, and to extinguish or destroy all the profits or produce ordinarily derivable from the soil. In a case in which a defendant claimed a prescriptive right, as the occupier of a brick-kiln, to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick-kiln, it was held that an unlimited claim of this nature upon the soil of the plaintiff could not be maintained, for it would, as claimed, enable the defendant "to take all the clay", or, in other words, to "take from the plaintiff the whole close" (*c*). So a privilege claimed of taking sand without limit is bad (*d*), although a custom to dig sand and gravel in the waste for the repair of dwelling-house, when out of repair, may be supported (*e*). It is possible that the plaintiff might establish a prescriptive right to take wood from the Mánavlí forest for certain limited purposes, such as the rebuilding of his house or the houses of his tenants, the repair of fences, or the manufacture of agricultural implements. But a claim to a prescriptive right to dispose as proprietor of all the timber growing on another's land is absolutely inadmissible. Such a right could only be created by express grant, and such grant the plaintiff has failed to prove.

For these reasons I am of opinion that the decree of the Court below must be affirmed.

GIBBS, J.:—After the elaborate judgment of my learned colleague, it is sufficient for me to say that I have arrived at the same conclusion on both the questions raised in the appeal. My judgment on the question whether the plaintiff has proved his proprietary title to the forest in the village of Mánávalí is based mainly on the construction of the *sanads*, which, I hold, did not convey to the plaintiff anything more than a

(*c*) *Clayton* v. *Corby* 5 Q. B. 415, 422; *Wilkes* v. *Broadbent*, 1 Wils. 63.
(*d*) *Blewett* v. *Tregonning*, 3 Ad. and E. 544.
(*e*) *Shakspear* v. *Peppin*, 6 T. R. 741.

right to receive the Government dues. They did not convey to him a right of property in the forest. As regards the 2nd question, I entirely concur with my brother MELVILL in considering the plaintiff has failed to establish his prescriptive right to cut the wood. We must, therefore, confirm the decree of the Court below.

Decree confirmed.

NOTE.—The following extract, as germane to the above case, made from a highly valuable note, to a recently published work of much ability —(Cases and Opinions on Constitutional Law, collected by Forsyth (1869), p. 175,)—on the subject of the construction of grants in England by the Crown to subjects, may perhaps be usefully inserted here:

"In cases of grants by the Crown, the rule of law has been that they are construed most strongly against the grantees, and that nothing passes by them without clear and determinate words. *Stanhope's Case*, Hob. 243, Bro. Abr. *Patent*, Pl. 62. But this must be taken with the qualification that the words are really doubtful, and when the interpretation in favour of the Crown might be without violation of the apparent object of the grant. In *Molyne's Case*, 6 Co. 5, it was held that the King's grant should be taken beneficially for the honour of the King and the relief of the subject; and Sir Edward Coke says there, that the ancient sages of the law construed the King's grants beneficially, so as not to make any strict or literal construction in subversion of such parts: see also, 2 Inst. 497. As to grants by the Crown *ex certâ scientiâ et mero motu*, see a valuable note to *The Case of Alton Woods*, 1 Co. 43 b. in the edition by Thomas and Fraser, vol. I., p. 110. The rule of strict interpretation is said not to apply to royal grants made upon a valuable consideration: Kent's Com. ii., 556.

"At all events, whatever may have been the old rule, one consistent with justice and common sense now prevails, and it has been expressed in a recent case: '*Upon a question of the meaning of words the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or from a subject; it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances:*' per Sir John Coleridge delivering the judgment of the Privy Council (present Lord Kingsdown, Dr. Lushington, Lord Justice Knight Bruce, Sir Edward Ryan, and Sir John Coleridge) in the case of *Lord* v. *Commissioners of Sydney*, 12 Moore, P.C. 497. (*f*)

"All grants from the Crown are matters of public record. 'The King cannot grant or take anything but by matter of record. * * * * It hath this sovereign privilege that it is proved by no other but by itself:' 3 Inst. 71. Royal franchises never pass by assignment without special

(*f*) Sir J. Coleridge prefaced the passage, placed above in italics, by saying that their Lordships were "clearly of opinion that upon the true construction of this grant, the creek where it bounds the land is *ad medium filum*, included within it. In so holding, they do not intend to differ from old authorities in respect to Crown grants; but upon a question of the meaning of words," &c., &c. — *Ed.*

1869.

VA'MAN JANA'RDAN JOSHI v. COLLECTOR OF THA'NA and THE CONSERVATOR OF FORESTS.

words in the Crown's grant (Year Book, 30 Edw. I.); and it is said that a royal franchise does not pass to the assignee of him to whom it was granted: *Ibid.* As to the necessity of express words to convey property of the Crown by reason of prerogative, see *Duke of Beaufort* v. *Mayor of Swansea*, 3 Ex. R. 413, and *Attorney General* v. *Parsons*, 2 C. and J. 279. In the latter case the Court said: 'The rules of construction upon grants from the Crown are much more favourable to the grantor than the rules of construction upon grants from ordinary persons.' But this does not mean that a *forced* construction is to be put upon the words in favour of the Crown, but only that where there is a doubt they shall be interpreted in its favour contrary to the ordinary rule by which *verba fortius accipiuntur contra proferentem*; a rule, however, which the Court said in *Lindus* v. *Melrose*, 27 L. J. Ex. 329, ought to be applied only where other rules of construction fail. 'If the King's grant can endure to two intents, it shall be taken to the intent that makes most for the King's benefit:' Com. Dig. *Grant* (G. 12): see *Jewison* v. *Dyson*, 9 M. & W. 540; *Doe d. Devine* v. *Wilson*, 10 Moore, P. C. 502.

"In the absence of any reservation to the Crown of any right of killing or taking wild cattle on lands granted or demised in a colony by the Crown, such right is included in the grant or demise: *The Falkland Islands Company* v. *The Queen*, 2 Moore, P. C. (N. S.) 266.

"In an opinion given by Sir A. Cockburn, A. G., and Sir R. Bethell, S. G., August 1854, on certain questions relating to the fishery revenues in Newfoundland, and including a question as to the extent of a Crown grant, they said: 'The meaning of the term 'coast' in the grant must, as it seems to us, be taken to mean the shore of what may be properly called the sea. Such is the ordinary acceptation of the term, and we see nothing to vary its sense in the present instance. We cannot, therefore, go the length of the opinion given by Sir F. Pollock and Sir W. Follett, that the term 'coast' will include the shores and bays, inlets and rivers, where the tide flows. It may or may not comprehend the shores of bays and inlets, according to circumstances. We think it does not include the shores of rivers. * * * * The grant from the Crown vested in the owner all the soil, except a particular 500 feet. The sea having swallowed up the latter, there can be, so far as the grant is concerned, no pretence for calling on the owner to make good the loss, and there is no prerogative right in the Crown to land so circumstanced.'

"In *The Lord Advocate* v. *Hamilton*, 1 Macqueen, H. L. 55, where the Crown claimed the bed of a public navigable river which by an Act of Parliament had been vested in trustees, on the ground that by a saving clause the rights of the Crown had been reserved, Lord Brougham said: 'You cannot out of this saving clause construe any right to be given to the Crown. The right which the Crown had independently of it, and previously to it, is saved and nothing more. The Crown is not to have its right lessened or diminished; but nothing whatever is *given* to the Crown by the saving clause, except the mode of ascertaining its rights by petition to the Court of Session. As, generally speaking, you cannot raise out of a proviso or an exception in a statute any affirmative enactment, so you cannot, generally speaking, raise out of a saving clause any affirmative or positive right whatever.'"—*Ed.*

Civil Petition.

1869.
Sept. 22.

BAGUBA'I, widow of VISA'JI DINKAR DESA'I... *Petitioner.*
KA'ZI SAYAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N..... *Opponents.*

Special Appeal—Appeal from orders of District Court relating to execution—Civ. Proc. Code, Sec. 372.

Held, that a Special Appeal lies from an order of a District Judge passed in appeal in a matter relating to the execution of a decree.

THIS was a miscellaneous civil application made to the High Court for the exercise of its extraordinary jurisdiction, under cl. 2 of Sec. 5 of Reg. II. of 1827, under the following circumstances:—

The petitioner, Bágubái, obtained a decree, No. 99 of 1865, in the Court of the Munsif of Puná against Kázi Sayad Nizmúddín and Kázi Sayad Amrúddín, upon a mortgage bond, in accordance with which she attached in execution the mortgaged property, a fourth share in the proceeds of the village of Erandvan. The defendants in the attachment proceedings applied to the Munsif's Court to raise the attachment, on the ground that the village attached was held in *inám* for a *devasthán*, for the support of the shrine of a Pir, Sayad Sadá, of which defendants were managers only.

The Munsif ordered the attachment to be raised. Bágubái thereupon appealed to the District Judge, who dismissed the appeal, on the ground that no appeal lay from a matter disposed of under Sec. 246.

The application came on for hearing before a Division Court (GIBBS and MELVILL, JJ.) on the 2nd of July 1869, which referred the matter to the Full Court on the preliminary point whether the petition could be admitted as a

1869.

BAGUBA'I, widow of VISA'JI DINKAR DESA'I v. KA'ZI SAYAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N.

special appeal from the Judge's order in appeal. The Full Court made an order on the 21st of July directing that the appeal should be received, and notice sent to the opposite side, subject to the question of the admissibility of appeal being raised at the hearing.

In accordance with this order, the point was argued before the Full Court (COUCH, C.J., WARDEN, GIBBS, LLOYD, and MELVILL, JJ).

Shántárám Náráyaṇ for the petitioner:—The question is whether a special appeal lies from the order of a District Judge passed in appeal in execution matters. The Calcutta and the Madras High Courts have held that a special appeal does lie in such cases (*a*), and, though the practice of this Court has invariably been to hold that no special appeal lies under the circumstances, the point has never been formally decided by it. The practice has arisen since the Civil Procedure Code came into force; before that time appeals were allowed generally from decrees and orders of District Judges passed in appeal.

The section which allows special appeal is Sec. 372, which enacts that, "unless otherwise provided, a special appeal shall lie to the Sudder Court from *all decisions passed in regular appeal* by the subordinate Courts." The words "decisions in regular appeal" in themselves are large enough to include orders in regular appeal in execution matters, as there is nothing in the section which makes it necessary to limit their meaning to *decrees* passed in regular appeal. The question thus depends upon the interpretation to be put upon the words "regular appeal," for unless these words have acquired a technical meaning, so as to be equivalent to *appeals from decrees*, there is nothing in Sec. 372 to support the present practice.

Reg. II. of 1827, Sec. 5, provides that "the Sudder Dewanny Adawlut shall hear and determine appeals against decrees and orders passed in the zillah Courts." In that

(*a*) 1 Marshall 296, 4 Mad. H. C. Rep. 32.

1869.

BAGUBA'I, widow of VISA'JI DINKAR DESA'I v. KA'ZI SAYAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N.

Regulation the words "regular appeal" does not appear to have acquired any fixed meaning. It is used by way of alternation with many other similar expressions. "Decisions regularly appealable," "ordinarily appealable decisions," "suits not ordinarily appealable," "orders not regularly open to correction by way of appeal,"—all these expressions occur throughout the different sections of Regs. II. and IV. of 1827. The words "regular appeal" seemed to have conveyed the idea of an ordinary or general appeal, an appeal going through the whole case of law and facts, as opposed to an appeal made to rest on special grounds.

Under the Regulations of 1827 the Ṣadr Adálat had a right to hear appeals from decrees as well as orders. Chap. 22 of Reg. IV. provides specifically for special appeals; and it expressly enacts in two separate clauses that special appeals shall lie in *all suits* not ordinarily appealable to the Ṣadr Adálat, and also *against orders* which, by not relating to the merits of the case in general, are not open to correction by means of appealing against the decree. Other sections in the same chapter provided that copies of the decrees or orders shall accompany the petition, and that the special appeal must be made within the time limited for regular appeal. The law, as laid down by these Regulations, was continued by Act III. of 1843, subsequently repealed by Act XVI. of 1853. Sec. 1 of Act III. of 1843, and Sec. 4 of Act XVI. of 1853 depart, however, from the language of the Regulations. For the first time the word "decisions" occurs, and as the Regulations of 1827 were not repealed by the new Acts, it follows that the word "decisions" was meant to include the suits and orders of the Regulations above-mentioned. These Acts took away from all subordinate Courts the power of hearing special appeals, which was under certain circumstances allowed to them under the Regulations; but the practice of the Ṣadr Court of admitting special appeals in execution matters remained unaffected by these Acts. The words of Sec. 372 are exactly those used in the sections just quoted. If, therefore, the practice founded under the

1869.

BAGUBA'I, widow of VISA'JI DINKAR DESA'I v. KA'ZI SAYAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N.

Regulations was not affected by the Acts of 1843 and 1853, there was no reason to alter it under the Code which uses the same language.

The present alteration seems to have been effected by force of the sections, which lay down generally that no appeal shall lie from orders passed in the course of a suit or prior to decree (Sec. 363), or from any order passed after decree and relating to the execution thereof, except as in the Code expressly provided (Sec. 364). These words are undoubtedly strong. The section referred to in the latter part of Sec. 364 is probably Sec. 283 of the Code, which provides that questions relating to mesne profits or interest, as well as sums alleged to have been paid in discharge or satisfaction, shall be determined by order of the Court executing the decree and not by separate suit, and the *order passed by the Court shall be open to appeal.* This section was repealed by Sec. 11 of Act XXIII. of 1861, which added other matters, namely, any other questions between the parties to the suit and relating to the execution of the decree. This section must be read as part of the Code (Sec. 44), and it will be seen that both the sections simply say that the order passed by the Court shall be open to appeal. The words are very nearly the same as those used in Sec. 332, which allows appeals from decrees.

The interpretation that I contend for is borne out by a comparison of Sec. 332, which allows regular appeals, and Sec. 372, which provides for special appeals. In Sec. 332 the words used are that an appeal shall lie "from decrees." The word "decisions" in Sec. 372 is evidently intended to bear a larger meaning than the word "decrees," and so to include orders.

That the Code contemplates special appeals from orders is also evident from Sec. 366, which provides that the time for appeals from orders shall be the same as the time for appeals from decrees. Besides, there are other sections which especially provide for appeals from orders both prior to and subsequent to the decree: Sec. 36 (in the matter of the

rejection of plaints); Sec. 76 (arrest before judgment); Sec. 85 (attachment before judgment); Sec. 94 (injunction); Sec. 119 (orders for setting aside judgment by default in appealable cases); and, lastly, Sec. 231, in matters of execution. In all these cases the words used are "an appeal shall lie," or "shall be open to appeal," exactly the same words as those used in Sec. 283 of the Code, and in Sec. 11 of the Act of 1861, and in some of these cases a special appeal clearly lies. The prohibition therefore to be operative, under the wording of Sec. 372, must be an express prohibition, as in Secs. 257, 269; otherwise the permission of an appeal includes special appeal by force of the words of Sec. 372.

The inconsistencies which result from the narrow construction are another argument against it; thus an order for mesne profits may be made at the time of the decree, or the settlement of the amount may be reserved; in one case a special appeal will be allowed; in the other, as being an order after decree, the Judge's decision in appeal will be final. Then, again, in Sec. 231 of the Code, and Sec. 11 of Act XXIII. of 1861; both relate to orders after decree, both relate to the execution of decrees, both prevent separate suits, both are subject to appeal, both have the form of a decree, and yet special appeal lies in one, while it is prohibited in the other case.

It is curious that about the time that the practice was here altered, the Madras High Court changed its practice, in the year 1860 as mentioned in the reported case. It was only last year that the Calcutta ruling was followed, and the old practice was restored.

Nánábhái Haridás for the opponents:—Some section must give the power to hear special appeals, but there is no section, except 372, which has reference to this subject. It is true the Regulations allowed special appeals from suits or decrees as well as orders, but it will be seen that they provide that copies of the decrees or orders shall accompany the petition of appeal. Act III. of 1843, subsequently repealed by Act XVI. of 1853, for the first time seemed to

1869.

BAGUBA'I, widow of VISA'JI DINKAR DESA'I v. KA'ZI SAYAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N.

narrow the power of admitting special appeals from decrees as well as orders passed in regular appeal. For these Acts provide for a special appeal from *decisions* passed in regular appeal, and the subsequent sections make it necessary that copies of the decrees appealed from—not decrees and orders as before—shall accompany the petition of appeal. These Acts, if they had stood by themselves, would certainly have altered the practice as it obtained before; but the old Regulations were not repealed by them, and that is the reason why the practice continued unaltered before the introduction of the Code, which for the first time repealed the Regulation law on the subject. Sec. 373 of the Code points out the limitation to be imposed upon the word *decisions*, because it provides that copies of the judgments and decrees shall accompany the application. This restrictive section taken along with the general section 364, which prohibits special appeals from orders passed after decrees, enforced a change in the old practice.

The contention on the other side that the words *decisions* in regular appeal which occur in Sec. 372 include *orders* as well as decrees, cannot be sustained; for, on referring to Secs. 26 and 27 of Act XXIII. of 1861, it will be seen that both these words are used side by side; Sec. 27 especially lays down that no special appeal shall lie from any decision or order which shall be passed in regular appeal in any suit of the nature cognizable by Small Cause Courts. The word *decision* in this place can mean nothing more than decree or judgment, an interpretation supported by the language of the Acts above referred to. The narrow interpretation is thus the only one which is borne out by the language of the Act itself, and the Courts cannot take on themselves to give a more liberal construction than the words warrant. Even after the ruling of the Calcutta High Court, the Agra Court has held that the limited interpretation is the only one borne out by the language of the Code of Civil Procedure and the subsequent Act (XXIII. of 1861).

Cur. adv. vult.

1869.

BA'GUBA'I' widow of VISA'JI DINKAR DESA'I v. KAZI SA'YAD NIZMU'DDI'N and KA'ZI SAYAD AMRU'DDI'N.

The judgment of the Full Court was, on the 22nd of September 1869, delivered by

COUCH, C. J. :—We concur in opinion with the Calcutta and Madras High Courts on the point which has been argued before us. This question has been raised from time to time in this Court; and whenever raised before me I have considered it to be liable to be re-opened for a formal decision. Under Sec. 372 a special appeal lies from all decisions in regular appeal. The words "regular appeal" have in no part of the Act been construed to mean an appeal from a decree. As stated in the judgment of the Chief Justice of the Calcutta High Court, a regular appeal means nothing more than a general ordinary appeal, an appeal lying on every ground of error, whether of fact or law. This seems to be the way in which the phrase has been used in the old Regulations. Unless the words have any special meaning attached to them, we ought not to put upon them a limited interpretation. We have held, under Sec. 376, that decree means an order, and none of the prohibitory sections seem to bear out the limited construction. Certainly, even if there were a slight ambiguity in the expression, there are very many reasons of convenience and expediency why we should adopt the liberal construction. We allow the special appeal.

Special appeal allowed.

Special Appeal No. 326 *of* 1869.

Oct. 6.

KA'SHINA'TH SITA'RA'M OZE' .....*Appellant.*
DA'DKI, Woman, *et al*.....*Respondents.*

Hindú widow—Sale—Onus probandi.

A party claiming immoveable property by virtue of an alienation by a Hindú widow during her son's minority is bound, whether he be a plaintiff *or a defendant*, to prove that he made reasonable inquiry, and that he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.

THIS was a Special Appeal from the decision of Arthur Bosanquet, Judge of the District of Thána, in Appeal Suit No. 520 of 1868, confirming on remand the decree of the Munsif of Pánwel, in Original Suit No. 345 of 1866.

1869.

KA'SPINA'TH SITA'RA'M OZE' v. DA'DKI, *et al.*

The plaintiff sued the defendants to recover possession of certain fields, which he alleged he had bought from the widow Dádki (defendant No. 1), and had let to her and the other defendants, but who would neither pay rent nor give up possession.

The Munsif threw out the claim, on the ground that the plaintiff had failed to prove that the sale by Dádki was for some common family necessity.

The Judge, on appeal, raised an issue whether it was proved that the widow, Dádki, sold the property for a necessary purpose, and recorded the following finding:—

"The land cultivated by Dádki appears, from the evidence, to have yielded enough produce for the support of herself and her children, but only barely enough, with rigid economy. Of the purchase-money specified in the deed of purchase, only Rs. 13 were taken by Dádki in cash. She admits having spent that sum on the subsistence of herself and her children. The remainder of the purchase was on account of old debts; and those debts are not proved to have been incurred for necessary purposes. I quite admit that if the burden of proof in this case lay on Dádki, the case would be given against her; for she has not proved that the old debts were incurred for unnecessary purposes; but then she could not be expected to prove a negative."

Upon these grounds the Judge made a decree in favour of the defendants.

On the 24th of September 1869 the Special Appeal was argued before GIBBS and MELVILL, JJ.

Shántárám Náráyan and *Bhairavanáth Mangesh* appeared for the appellant.

Dhirájlál Mathurádás appeared for the respondents.

The Court took time to consider, and on the 6th of October 1869 the judgment of the Court was delivered by

MELVILL, J.:—The special appellant contends that this suit was brought by him as landlord against his tenant, Dádki, and that the Courts below should have found whether the letting was proved; and, if so, should have

awarded him possession of the land, leaving Dádki's sons, if so advised, to sue to set aside the sale. This would certainly have been the proper course; but as Dádki's sons, Máhádú and Padjá, have been made parties, and therefore all who are interested are before the Court, it is admitted that we ought to avoid the multiplication of suits, and determine the validity of the sale by Dádki to the plaintiff, instead of leaving that question to form the subject of a separate action.

Mr. Shántárám has urged upon us that the fact of the letting ought to be determined, because if that be proved the plaintiff must be regarded as being in possession of the land, and Máhádú and Padjá must be treated as if they were plaintiffs in ejectment, and bound, as such, to establish their title. In other words, the argument is, that it would not be for the plaintiff in this case to prove the validity of the sale, but for Máhádu and Padjá to prove that the land was not sold by their mother for necessary expenses. We do not think that this argument is sound. In *Hunoompersaud Pánday* v. *Mussumat Bábooee Munráj Koonweree* (*a*), which was a suit to oust a mortgagee in possession, on the ground that the mortgage by the plaintiff's mother was invalid, it was held by the Judicial Committee of the Privy Council that, "where the mortgagee, with whom the transaction took place, is setting up a charge in his favour, made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan." Having regard to the decision in that case, and to the decisions of this Court in the cases *Trimbak Anant* v. *Gopálshet bin Máhádshet* (*b*), and *Gáne Bhive Parab, et al.* v. *Káne Bhive et al* (*c*), we think that a party claiming immoveable property by virtue of an alienation by a Hindú widow during her son's minority, is bound,

(*a*) 6 Moo. Ind. App. 393.
(*b*) 1 Bom. H. C. Rep. 27. (*c*) 4 Bom. H. C. Rep. A. C. J. 169.

1869.

KA SHINA'TH SITA'RA'M OZE' v. DADKI, *et al.*

whether he be a plaintiff or defendant, to prove that he made reasonable inquiry, and that he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.

The question then which the Courts below should have determined, and which they must now be called upon to determine, is, whether the plaintiff has proved that he purchased the property in dispute *bonâ fide*, and believing, after making reasonable inquiries, that the sale was necessary for the support or other unavoidable expenses of the family.

The value of the property purchased will form an important element in deciding this question. Dádki alleges that it is worth Rs. 500, and that she only intended to mortgage it, and not to sell it for Rs. 125. The Judge has found that she has failed to prove any agreement for re-conveyance; but she would certainly not have been justified, and the plaintiff must have known that she was not justified, in selling the family estate, if she could have raised enough for the family necessities by simply mortgaging it; as Westropp, J., says in *Dagdú bin Dáud* v. *Shekh Saheb valad Badrúddín* (*d*), "in ascertaining whether the sale is for the benefit of the infant full adequacy of price is a most important question."

The decree of the Lower Court is reversed, and the case remanded for a new decree with reference to this judgment

Decree reversed and case remanded.

(*d*) 2 Bom. H. C. Rep. 348, 360.

Special Appeal No. 146 of 1869. 1869. Oct. 6.

NARSA'PPA' LINGA'PPA', *et al* .....*Appellants.*
SAKHA'RA'M KRISHNA .....*Respondent.*

Hindú law—Inheritance—Widowed mother's estate as heir of her son— Stridhan.

Held, that in a separated family a Hindú mother succeeding to her son's immoveable property takes in it the same estate as a Hindú widow takes in the immoveable property of her husband dying without male issue.

A Hindú died leaving by his first wife, who predeceased him, three sons, from whom he had separated, his second wife and a minor son by the latter. The minor son died in infancy.

Held, that the mother succeeded to the immoveable property of her minor son, but took only a life interest in it.

THIS was a Special Appeal from the decision of R. W. Hunter, Senior Assistant Judge at Solápúr, in Appeal Suit No. 137 of 1867, confirming the decree of Krishṇaráv Sadáshiv, Ṣadr Amín, in Original Suit No. 631 of 1866.

The Special Appeal was argued on the 29th June 1869 before GIBBS and MELVILL, JJ. The facts sufficiently appear in the judgment of the Court.

Bhairavnáth Mangesh for the appellants.

Vishvanáth Náráyaṇ Mandlik and *Gaṇpatráv Bháskar* for the respondent.

Cur. adv. vult.

6th October—GIBBS, J.:—This is a suit to recover possession of land sold by a Hindú widow, on the ground that the widow could not alienate it. It appears that her husband, Krishṇaráv Parsharám Limaye, was twice married; by his first wife he had three sons, one of whom is the plaintiff; by his second wife, the defendant Rádhábái, one son. Krishṇaráv divided his property into five shares, three of which he gave to his three sons by his first wife, retaining the other two for himself; on his death he left the one son by Rádhábái, who, being a minor, was under the guardianship of his mother. This minor subsequently died, and the whole of these two shares came into the hands of Rádhábái, a portion of which, field No. 315, subsequently sold by her

1869.

NARSA'PPA' LINGA'PPA' *et al* *v.* SAKHA'RA'M KRISHNA'.

to the 1st and 2nd defendants, forms the subject of this action The Sadr Amín of Solápúr being of opinion that Rádhábái could alienate her life interest in the field, rejected the claim. on the ground that no suit would lie until after her death. This decree was confirmed by the Acting Senior Assistant Judge. A special appeal has now been made by the 1st and 2nd original defendants, on the grounds that the sale was good, not only for Rádhábái's lifetime, but for ever, and that the Lower Court was in error in holding that immoveable property inherited by a mother from her son is not her *stridhan*. Other points were taken, but this was the only one that was argued.

Mr. Bhairavanáth in support of the special appeal cited the following authorities:—*Navalrám Átmaram* v. *Nankishor Shivnaráyán* (*a*); *Doe d. Kullammul* v. *Kuppu Pillái* (*b*); *Vyavahara Mayukha, ch. IV., sec.* 10, *paras.* 7, 8 *and* 9 (*c*); *Grady on Hindú Law, pp.* 186 *and* 221; 1 *Morley's Digest* 595; *West and Bühler on Inheritance, LXIII.; Jamiyatrám* v. *Bái Jamná* (*d*).

The argument sought to be supported by these authorities was that property inherited by a widow, no matter from whom, other than from the husband, is of the nature of *stridhan*, and therefore can be alienated absolutely by her.

Rávsáheb V. N. Mándlik on the other side, argued that the rule by which a widow in a divided family succeeds to her husband's interest is the same rule by which, under the same circumstances, the mother would inherit the property of her son. The property inherited from a son can never form a portion of her *stridhan*. Manú only acknowledges six forms of *stridhan*, and there is no mention made among them of "property inherited." He quoted in support of his argument: *Vyavahara Mayaka, ch. IV., sec.* 6, *para.* 15; *sec.* 8, *paras.* 3 *and* 16-20; *sec.* 10; *Mitac., ch. II., sec.* 1, *sec.* 11, *paras.* 1-5; *Daya-krama Sangraha, ch. II., sec.* 2, *paras.* 1 *and* 2, *and* 21-29; *Steele on Hindú Custom*, 69,

(*a*) 1 Bom. H. C. Rep. 209.
(*b*) 1 Mad. H. C. Rep. 85.
(*c*) Stokes' Hindú Law Books, p. 100.
(*d*) 2 Bom. H. C. Rep. 10.

para. 72; *Bechar Bhugvan* v. *Bai Lakshmi* (*c*), *Sengamalathammal* v. *Valaynda* (*f*), *Goburdhun Nath* v. *Onoop Roy* (*g*), *Punchanund Ojhab* v. *Lalshan Misser* (*h*), *Doorga Dayee* v. *Poorun Dayee* (*i*), *Kashee Chunder* v. *Gour Kishore* (*j*).

The question for us to decide in the present case is what right has a widow over the property which she inherits from her minor son, who, with herself, is a member of a divided family. Mr. Bhairavanáth points to the Mitákshárá, as alluded to in the judgment of Mr. Justice Forbes in *Navalrám Atmarám* v. *Nandkishor Shivnáráyan* (*supra*), in which the following passage occurs in describing a woman's *stridhan*:—"Also property which she may have acquired by inheritance;" and argues that there is no limitation as to the person from whom the inheritance is derived; that, therefore, whether a woman inherits from her own family, or from the family of her husband, such inherited property equally comes under the head of *stridhan*; and that the case just quoted, as well as the case of *Kullámmál* v. *Kuppu Pillai* (*supra*), shows that a woman can dispose of such property absolutely. Before noticing the arguments of the other side, we remark that the question of a woman's *stridhan* going to her own heirs, and not to those of her husband, may be taken to have been authoritatively settled in this Court by the case quoted (*k*), and the entire question before the Court turns on whether the son's property, when inherited by the mother, becomes part of her *stridhan* or not. In the case of *Jamiyatrám* v. *Bái Jamná* (*l*) the judgment of Sir Joseph Arnould, Acting C. J., pointed out that the property acquired by inheritance, and which in consequence becomes part of the widow's *stridhan*, can only consist of property inherited by her *from members of her own family*. This view has been questioned by the learned editors of the Digest of Hindú Law, Messrs. West and Bühler (*m*); but whether their criticism

(*e*) 1 Bom. H. C. Rep. 56. (*f*) 3 Mad. H. C. Rep. 312.
(*g*) 3 Calc. W. Rep. Civ. R. 105. (*h*) Ibid. 140.
(*i*) 5 Ibid. 141. (*j*) 10 Ibid. 139.
(*k*) Naválrám Atmárám v. Nándkeshor Shivnáráyan, 1 Bom. H. C. Rep. 209.
(*l*) 2 Bom. H. C. Rep. 10. (*m*) Introduction, p. 65.

1869.

NARSA'PPA' LINGA'PPA', *et al.* *v.* SAKHA'RA'M KRISHNA'.

is correct or not, the decision which has been followed on several occasions is binding upon this Court as a precedent. Were it otherwise, we are of opinion that the very able argument for the respondent and the authorities cited have distinctly shown that the rule under which the widow succeeds to her son's separated property is the same under which she succeeds to her husband's in a divided family.* Now the interest of a widow in her deceased husband's estate (he being a member of a divided Hindú family) has been authoritatively settled by this Court to consist of a life interest only in immoveables, while moveables are taken absolutely: *Vináyák* v. *Lakshmibái* (*n*), and *Devkuvarbái's case* (*o*). We do not consider that Mr. Bhairavanáth has in any way met this argument, and in holding, as we do in the present case, we are only following the latest rulings of the High Courts of the two other Presidencies (*p*). We consider, therefore, that Rádhábái has in the estate inherited from her minor son taken only a similar interest to that which she would have taken had the estate come to her direct from her deceased husband, viz., a life interest in the immoveable property. We agree therefore with the decision arrived at by the Lower Court, which we confirm with costs.

Decree confirmed.

(*n*) 1 Bom H. C. Rep. 117. (*o*) Ibid. 130.
(*p*) Calc. W. Rep. 139; 3 Mad. H. C. Rep 312.

* Mitákshará, Ch. II., Sec. 1, paras. 1 and 2; Stokes' H. L. B., p. 427; Mayukhá, Chap. IV., Sec. 8, paras. 1 and 2; Stokes' H. L. B., pp. 83 and 84.

Referred Case.

1869. Oct. 7.

DHONDIBA' LAKSHUMAN..... *Plaintiff.*
KUSA', a Minor, by his Mother and Guardian, BAYA'JI..... *Defendant.*

Procedure—Minor—Defendant—Certificate of Administration.

A suit against a minor whose estate exceeds Rs. 250 in value cannot be proceeded with, unless he be represented by a person holding a certificate of administration under Act XX. of 1864.

The plaintiff may apply to the District Judge to appoint an administrator, if none such has been appointed.

UNDER Section 22 of Act XI. of 1865, the following case was submitted for the orders of the High Court by Janárdán Vásudevji, Judge of the Court of Small Causes at Puṇá.

"How is a suit instituted against a minor represented by a guardian, as the representative of a deceased person, to be proceeded with, when such guardian enters appearance without obtaining a certificate of administration in respect of the minor's estate, which exceeds Rs. 250 in value.

"The guardian of a minor defendant entered appearance on the day for which the suit was set down for trial, and, on being interrogated, she admitted that her deceased husband had left lands, which, after his death, she had assigned in mortgage to his creditors as security for debts amounting to Rs. 400; and as she produced no certificate of administration in respect of the estate to which the minor has succeeded, she was directed to obtain one from the District Judge, without which she was told that she could not be heard in answer to the plaintiff's claim, under Section 2 of Act XX. of 1864. For this purpose she was allowed three long adjournments; but she has failed to produce the requisite certificate, and her pleader now states that he has no instructions from his client as to whether she has or has not obtained the certificate.

"The defendant's pleader cannot be heard in defence; and if a suit be proceeded with *ex parte* under such circumstances, the interests of the minor may perhaps suffer in cases in which there may be a good defence.

1869.

DHONDIBA' LAKSHUMAN v. KUSA', a Minor, by his Mother and Guardian, BAYA'JI'.

"By law the care of the person of a minor and the charge of his property vest in the District Judge (*vide* Sec. 1, Act XX. of 1864). That officer is therefore the legal guardian of the minor, and I think may be joined as a defendant in that character in cases in which no kinsman of the minor has obtained a certificate of administration."

PER CURIAM (WARDEN and LLOYD, JJ.):—The suit cannot be proceeded with unless the minor be represented by a person holding a certificate of administration under Act XX. of 1864. The Small Cause Court Judge should inform the plaintiff that he should apply to the District Judge to appoint an administrator under that Act.

Oct. 13.

Special Appeal No. 354 *of* 1869.

SHRIDHAR VINA'YAK, Minor, by his Guardian, SAKHA'RA'M SADA'SHIVA.....*Appellant.*

BA'BA'JI bin JIVA'JI .....*Respondent*

Limitation—Purchase at sale by Court—Suit heard and determined— Res judicata.

As a purchaser at an auction sale held by a Court only acquires the right title and interest of the judgment-debtor in the property sold, a plea of limitation that would be good against the judgment-debtor is good also against the purchaser.

When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject of such suit in an action brought by him.

THIS was a Special Appeal from the decision of Baron De H. Larpent, Joint Judge Puṇá district, in Appeal Suit No. 238 of 1869, confirming the decree of the Munsif of Puṇá.

The plaintiff, Bábáji bin Jiváji, purchased a house, the subject of the present suit, at an auction sale held, in 1861, in execution of a decree obtained by Viṭhal Janárdan, against his judgment-debtor, Dattú Kasár. The plaintiff, on attempting to take possession of the house, was obstructed by Vináyak Shivrám, the father of the minor defendant,

1869.

SHRIDHAR VINA'YAK, Minor, by his Guardian, SAKHA'RA'M SADA'SHIVA v. BA'RA'JI bin JIVA'JI.

Shridhar Vináyak, who claimed to have possession of the house, under a mortgage bond passed in 1830, by one Harí Kasár, which mortgage had been converted into an absolute sale in 1832, on the expiry of the term of the mortgage bond, viz., two years. Vináyak Shivrám presented a petition, under Sec. 246 of the Civil Procedure Code, upon which an order was made against the petitioner, who thereupon brought a regular suit to have his right to the house established. The Munsif made a decree in favour of Vináyak Shivrám, but in appeal the Assistant Judge refused to take cognizance of the mortgage, as the mortgage bond was on unstamped paper, and found that Vináyak Shivrám's possession of the house was not sufficient to give him a prescriptive title to it, and this decree was confirmed in special appeal by the High Court. When the plaintiff proceeded to take possession he was again obstructed by Vináyak Shivrám. On the renewal of this obstruction the plaintiff presented a petition to the Munsif's Court, under Sec. 269 of the Code, and these proceedings resulted in the present suit, in which the plaintiff, as auction purchaser, sought to remove the obstruction caused by the defendant.

The guardian of the minor defendant said in his written statement that Dattú, the judgment-debtor, whose rights and interests were purchased by the plaintiff in execution of the decree against him, had no right to the house; that the house belonged to Hari Kasár, and had been mortgaged to the father of the minor defendant, which mortgage had been turned into an unconditional sale in 1832. He further pleaded that plaintiff's claim to the house was barred by limitation.

The Munsif of Puṇá awarded the claim of the plaintiff, finding that he had proved his right to the house.

The defendant appealed from this decision, and the Joint Judge confirmed the Munsif's decree, chiefly on the ground that the decree passed in 1864 by the Assistant Judge, and confirmed on appeal to the High Court, was a conclusive determination that the plaintiff in that case, who was defendant in the present suit, had no title to the house, and no

1869.

SHRIDHAR VINA'YAK, Minor, by his Guardian, SAKHA'RA'M SADA'SHIVA v. BA'BA'JI bin JIVA'JI.

further evidence could be received upon a point finally adjudicated upon. The Joint Judge further held that the plaintiff had a right of action within twelve years from the purchase, and found accordingly that his claim was not barred by limitation.

The defendant appealed from this decision of the Joint Judge, and the appeal was heard before COUCH, C.J., and MELVILL, J.

Bhairavanáth Mangesh for the appellant:—The previous decision referred to by the Judge, as a conclusive determination of the rights of the parties, was given in appeal suit No. 10 of 1863 on the 26th of February 1864. In that case the Assistant Judge refused to take cognizance of the mortgage bond by reason of its being not stamped; and on the only other issue laid down by him he found that, "though from the oral evidence it clearly appeared that plaintiff has occupied the house for many years, and there is no proof of his having paid any rent for it, the evidence did not establish the facts of thirty years' possession, which alone could give a prescriptive title." If this decree is to be held conclusive against the present defendant's title by adverse possession to the house, it is evidence also that this adverse possession has been for many years with the defendant, in fact ever since 1830. That decision was passed in 1864, since which time the defendant has continued in possession undisturbed till now. There is nothing in that decision to prevent the defendant from availing himself of the ordinary defence of limitation as a bar to the plaintiff's claim. Prescription is not the same thing as limitation; one confers a title, the other is good as a plea in bar. The former decision might be conclusive, so far as the defendant's prescriptive title is concerned, but it did not determine the question of limitation as a bar to the present suit. The adverse possession of the defendant certainly extends over more than twelve years; and if the defendant could have pleaded this possession against the original owner of the house, it was good against the plaintiff, who was an auction purchaser only.

Ganpatráv Bháskar for the respondent.

Cur. adv. vult.

1869.

SHRIDHAR VINA'YAK, Minor, by his Guardian; SAKHA'RA'M SADA SHIVA v. BA'BA'JI bin JIVA'JI.

COUCH, C. J.:—The Joint Judge was in error in holding that the plaintiff's right of action accrued at the date of his purchase in 1861. He only purchased the right and interest of Dattú in the property, and could not be in a better position than Dattú.

The Joint Judge was also in error in holding that because Vináyak had failed to establish his title in a suit in which he was plaintiff, he was necessarily debarred from defending his right of possession against the present plaintiff. He failed to establish his title, because he could not prove possession for thirty years; but after Act XIV. of 1859 had come into force he was not liable to be ejected, if it could be shown that he had had adverse possession for twelve years. The only proceedings of the plaintiff which appear on the record, and of which we can take cognizance, were commenced in 1864, and the defendant was then legally entitled to defend his possession if he had held it adversely for more than twelve years. The decision of the Assistant Judge of Puṇá in appeal suit No. 10 of 1863, which was confirmed in special appeal by this Court, leaves no room for doubt that in 1864 Vináyak had been in possession adversely to the plaintiff and the person through whom he claimed for considerably more than twelve years. Under these circumstances the plaintiff could not oust him. The Joint Judge's decree must be reversed with costs.

Decree reversed with costs.

1869.
Oct. 13.

Regular Appeal No. 12 *of* 1868.

VINA'YAK NA'RA'YAN JO'G .....*Appellant.*

GOVINDRA'V CHINTA'MAN JO'G.....*Respondent.*

Hindú law—Will—Attestation—Adoption of son subsequent to will—Revocation.

The will of a Hindú in the Mofussil need not be signed by the testator, or made with any particular formalities; all that is requisite is that it be a complete instrument, and express the deliberate intentions of the testator.

Where a separated Hindú made a will, and subsequently adopted a son, the boy adopted and his father being aware of the provisions of the will, in which an adequate provision was made for the adopted son, *it was, held* that the subsequent adoption did not invalidate the will.

THIS was an appeal from the decision of F. Lloyd, Judge of the District of Puṇá, in Original Suit No. 201 of 1865. The facts of the case fully appear in the following extracts from the judgment of the District Judge :—

"This is a suit instituted by Govinḍráv Chintáman to recover from his uncle, Vináyak Náráyaṇ, houses, ornaments, &c., of the value of nearly one lakh of rupees, to which he alleges he is entitled, as the adopted son of Chintámaṇráv, the brother of the defendant, Vináyak Náráyaṇ.

"Náráyaṇráv is the common ancestor of the family. Vináyakráv is the eldest of four brothers, sons of Náráyaṇrav, Chintámaṇráv, Sadáshivráv, and Yeshvaṇtráv being the other three. Of these Sadáshivráv died, and his son separated from the family in 1858, and is not connected with the present suit. In November 1862 Chintámaṇráv and Yeshvaṇtráv executed a formal deed of separation, addressed to Vináyakráv, with reference to a previous deed of disposition of the family property executed by all the three brothers in 1858. Chintámaṇráv being childless, the present plaintiff, Govinḍráv, was given in adoption by his natural father Yeshvantráv, and Chintámaṇráv accordingly adopted Govinḍráv on the 19th December 1862, and shortly afterwards, on the 22nd December, Chintámaṇráv died, leaving a widow, by name Sarasvati Bái.

1869.
VINA'YAK NA'RA'YAN JO'G v. GOVINDR'AV CHINTA'MAN JO'G.

"In 1863-64 Govindráv applied to Vináyakráv for possession of his adoptive father's estate, when he was informed that Chintámaṇráv had left a *vyavasthá patra*, or will, under which he was only entitled to 20,000 rupees out of the personal estate, and property to this amount was accordingly made over to him, for which he passed a receipt, and a release in full satisfaction of all demands against his uncle. The plaintiff asserts that, on subsequent information, he found that he has been the victim of fraud, his father never having, as alleged, restricted his interest in his moveable property to that sum, and hence he brings this action.

"Vináyakráv's defence is, that he has acted in accordance with the will of his late brother, Chintámaṇráv, and that the plaintiff has received all that he is entitled to under the will, and has formally passed a release giving up all further claim against him. He also objects to various items of the claim as being altogether incorrect.

The following issues were accordingly laid down:—(1) whether the will was invalid, by reason of its being unstamped; (2) whether the will was genuine and valid; (3) whether the release given by the plaintiff barred the claim; and lastly, (4) what portion of the property was the plaintiff entitled to.

On the first issue it was found that the *vyavasthá patra* was a will, and therefore not subject to stamp duty; on the second issue, that the *vyavasthá patra* was not signed by the deceased testator, an omission which the Judge considered fatal to its validity. "Certain witnesses," he said, "state that the word *karateshwar* at the head of the document is in the handwriting of the deceased, but the contention of the defendant that writing this invocation is equivalent to due execution is an assertion not borne out by the evidence. Out of the three witnesses who attested the document, the first and the third admit their attestation. The first witness, however, is the defendant himself, and being interested in the will, was not a competent attesting witness, and being interested in this case, his evidence must be regarded with caution. The second witness is Yeshvantráv, the natural father of the plaintiff. He alleges his signature to be a forgery; and points out that

1869.

VINA'YAK NA'RA'YAN JO'G v. GOVINDRA'V CHINTA'MAN JO'G.

had he written it himself he would never have used the prefix *sahi* (signature) before his name. There is also a difference in the form of the initial letter from that usually written by him, which indicates that it is not a genuine signature. The absence of the testator's signature makes the will invalid, and it is not necessary to discuss the argument and the testimony of witnesses *pro* and *con*.

On the third issue I find that no cognizance can be taken of the release, as it is insufficiently stamped; and though in the other document, which is a receipt, plaintiff foregoes all further claims against defendant, yet under the circumstances it cannot be considered as a bar to the present suit. It is alleged that at the time when these documents were passed by the plaintiff he had seen the *vyavastha patra* which was produced at the time; but the evidence is conflicting, and the fact is not established. If it had been present, the probability is that it would have been referred to in the body of these documents. The defendant being aware of the defect in the will, had strong reasons for keeping it out of sight; and the argument that the will must be genuine, as Yeshvantráv could not have otherwise attested the release and the receipt, falls to the ground, because it is not proved that his signature on the will is genuine." The third issue also was decided in the negative.

In determining the last issue as to the portion of the property to which plaintiff was entitled to under the will, it was held that he was entitled to the two houses at Puṇá and Belgaum, because they had fallen to Chintámaṇráv's share; and of the ornaments, &c., it was decided that, after making all allowances and deductions, plaintiff was entitled to the sum of Rs. 21,167-12-8; the rest of the claim was disallowed.

The appeal was argued before COUCH, C.J., and MELVILL, J., on the 29th of September 1869.

Macpherson (with him *Shántárám Náráyaṇ*) for the appellant. If the will is established to be genuine the absence of the signature cannot make it invalid. It is a Hindú will, and it has been held that neither Act X. of 1865, nor the rules of English law as to execution and attestation apply in the

case of Hindú wills: *Muncharji Pestonji* v. *Náráyaṇ Lakshuman* (*a*), *Crinivasammal* v. *Vijayammal* (*b*). Besides, in this case the invocation to *karateshwar* was in the testator's handwriting, which is commonly used to authenticate documents as effectively as a signature. On referring to the will itself, it will be seen that it was never intended that the testator should sign it; the signatures of the witnesses, instead of being on the left side, leaving the right side for the signature of the executing party, are put down on both sides, the words *sáksha* being in the middle of the paper.

Marriott (with him *Vishvanáth Náráyaṇ Mandlik*) for the respondent:—The property bequeathed by the will is admitted to be ancestral, both moveable and immoveable; and that being so, the will could not operate as a valid will to the prejudice of the legal heirs of the deceased. This devise must be considered to have been revoked by the subsequent adoption of the plaintiff. The rights and status of an adopted son are the same as those of natural born sons, and from the moment of adoption the adopted son became joint owner with his father of the ancestral property, and the will must be considered to have been revoked as much as if a son had been born subsequently to it.

Macpherson:—This objection to the validity of the will was not among those raised by the plaintiff before the Judge.

(COUCH, C. J.:—Though the grounds of the decision arrived at by the Lower Court be incorrect, the party in whose favour it is may support it on other grounds.)

Marriott:—A general devise is necessarily bad against natural born sons, and therefore equally so against sons by adoption. He cited Madras S. D. A. Rep. for 1859, p. 35.

Macpherson in reply:—The adoption and the will were one and the same transaction. The adoption took place in accordance with the will, and was intended to give effect to it. The whole transaction was moreover a family arrangement, and acquiesced in by all parties.

Cur. adv. vult.

(*a*) 1 Bom. H. C. Rep. 77. (*b*) 2 Mad. H. C. Rep. 37.

1869.

VINA'YAK NA'RA'YAN JO'G v. GOVINDRA'V CHINTA'MAN JO'G.

13th October 1869—COUCH, C. J.:—In this case I am of opinion that the District Judge was wrong in holding the will on which the defendant relies to be invalid, merely because it does not bear the signature of the testator. I know of no provision of Hindú law which renders a signature indispensable to the validity of such a document. It has been held by this Court that no particular formalities are required in the execution of a will by a Hindú: *Manchárji Pestánji* v. *Náráyaṇ Lakshumaṇji and others* (*supra*); and the High Court of Madras have also held this: *Crinivasammal* v. *Vijayammal* (*supra*). All that is necessary to be shown is that the will is a complete instrument, and that it expresses the deliberate intentions of the testator. The District Judge, in forming the conclusion at which he has arrived in this case, appears to have had in his mind the formalities which the English law requires in the case of a will made by an English testator; but neither this, nor any similar law has yet been made applicable to testaments executed by a Hindú in this country.

As the case however comes before us in regular appeal, we have to consider whether the document in question was a complete instrument, and whether the evidence shows that the testator wrote the word *karateshvar* at the head of the document, and caused it to be attested as his will. Now the position of the word *sákshi* (áttesting) at the foot of the document clearly shows that it was never intended that it should be signed, and I think it is quite in accordance with Hindú custom that a person executing an instrument should write an invocation to the deity at the head of it, with the intention of signifying, in the same manner as he would signify by his signature, that such instrument was his own act and deed. So much for the appearance of the document itself, and the inferences to be drawn from it. Now, in regard to the evidence recorded in the case, Yeshvantráv, the father of the plaintiff, declares that the signature purporting to be his own on the will is a forgery. It is very improbable that such a forgery should have been committed. And the supposition that the signature is a forgery is quite inconsistent

with the fact that Yeshvantráv did subsequently, as he himself admits, attest the exhibit No. 14, in which the will is referred to and effect given to its provisions. There is evidence that the will was produced when exhibit No. 14 was executed, and it is impossible to escape the conclusion that the will was either produced at the time, or that it had been produced and examined, and acknowledged to be valid, and that exhibit No. 14 was deliberately executed with the intention of giving effect to its provisions. Yeshvántráv's own statements are very unsatisfactory, and I have no doubt that he did sign the will, his attestation being probably considered desirable because he was a near relation of the testator, and the father of the person whom the testator was about to adopt. The conclusion at which I arrive on the whole of the evidence is, that Chintámaṇráv did write the word *karateshvar* on the will, that he caused it to be attested, and that he intended it to take effect as his last will and testament.

This being so, it only remains for me to consider whether there is any force in the objection raised by the plaintiff's counsel that the will must be considered to have been revoked by the subsequent adoption. In connection with this question, it is important to see what the provisions of the will are. It runs thus:—"Goviṇdráv, the son of my younger brother Yeshvantráv, is to be adopted. What is to be given to him is as follows:—ready cash, gold coins and jewellery, and silver, making an aggregate of Rs.20,000." Provision is then made for the payment of a similar sum to the testator's widow. Now, although the witnesses differ to some extent as to the exact value of the property left by Chintámaṇráv, the whole evidence goes to show that it was not much in excess of the two legacies above-mentioned; so that in fact it may be said that the testator divided his property between his widow and his adopted son, making a proper provision for the former, and assigning a fully sufficient sum for the maintenance of the latter. It may well be that if the testator had disposed of his property without making a sufficient provision for the son

1869.

VINA'YAK NA'RA'YAN JO'G v. GOVINDRA'V CHINTA'MAN JO'G.

whom he was about to adopt, such a will would be revoked by the adoption. There is an absence of authority directly bearing on this point, but there is a passage in 6 Moore's Indian Appeals, page 320, which incidentally touches upon it. In answer to a question referred to them, the pandits said: "If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the will according to the Hindú law, it being incompetent for the testator who authorized the adoption of a son to alienate the whole of his estate, and thereby injure the means of the maintenance of his would-be heir." This seems to be quite consistent with the principles of Hindú law, and, under the circumstances indicated, a Court would probably consider the will revoked by an adoption; but in the present case the provisions of the will may stand consistently with the adoption, for a provision has been made in it for the maintenance of the son, and that provision is as ample and liberal as any person in the testator's circumstances was bound to make.

There is another light in which the subject may be regarded. The father of the plaintiff was not bound to give his son in adoption; both he and the plaintiff were fully cognizant of the intentions of Chintámaṇráv in regard to the disposition of his property, and in consenting to the adoption after the will had been made, it must be held that they consented that it should be made on the terms therein provided, and admitted that the provision made for the plaintiff was sufficient, Having done this, they cannot now be allowed to repudiate the terms of the adoption. The will and the adoption were in point of fact parts of one and the same transaction, and must stand or fall together. I am aware of nothing in the Hindú law which requires me to pronounce the will to be invalid, and thereby declare that it is out of the power of a Hindú to adopt a son, and at the same time to make adequate provision for his widow. It is true that an adopted son occupies the same position as a natural born son; and if the adoption had preceded the will the plaintiff might have

objected to the will being made. But the adoption having been made in accordance with the will, and the plaintiff having, as appears from his subsequent conduct, assented to the will, and taken the benefits which it secured to him, it is impossible to hold that he is now at liberty to repudiate it. I think there must be a decree for the defendant, and that the plaintiff must bear the costs of both these appeals, and all costs in the Court below.

1869.
VINA'YAK NA'RA'YAN JO'G v. GOVINDRA'V CHINTA'MAN JO'G.

MELVILL, J., concurred.

Marriott for the respondent:—By the terms of the will two houses are secured to the plaintiff, and these have not been made over to him. So much of the District Judge's decree as awards these two houses should be confirmed.

COUCH, C. J.:—The answer to that is, that you cannot claim a decree on a ground which is quite inconsistent with your plaint. You cannot sue as heir-at-law to set aside the will, and, failing that, ask for a decree as devisee under the will. If the defendant does not carry out the terms of the will the plaintiff has his remedy.

Decree reversed with costs.

Referred Case.

Nov. 30.

MANCHHA'RA'M KALLIA'NDA'S .....*Plaintiff.*
BA'KSHE SA'HEB mir MAINU'DI'N KHA'N ...*Defendant.*

Action on judgment of Mofussil Court—Cause of Action—Small Cause Court.

A suit cannot be maintained in a Small Cause Court in the Mofussil to enforce the decree of a Civil Court.

CASE referred under Act X. of 1867 by Sayád Hussán El Mediní, Judge of the Small Cause Court at Súrat, for the decision of the High Court.

"This plaint has been presented on behalf of the plaintiff to recover the amount of 200 Rupees due on a decree of the Court of the Principal Ṣadr Amín of Súrat, No. 1,588 of

1869.

MANCHHA'RA'M KALLIA'NDA'S v. BA'KSHE SA'HEB mir MAINU'DI'N KHA'N.

1861. No process of execution was taken to enforce the decree within the time prescribed by Sec. 20 of Act XIV. of 1859, and, consequently, its enforcement now is barred.

"Assuming the decree as creating a debt or obligation of record, the *vakíls* urge that Cl. 11 of Sec. 1 of Act XIV. of 1859 contemplates that a suit on such a decree may be entertained.

"No doubt a suit on a judgment is contemplated in the clause referred to above; but it must either be between parties or in Courts governed by English law, and the judgment must be of a Court of Record.

"Mr. Justice Phear of Calcutta has made the following observations respecting the words 'cases governed by English law':—'I am of opinion that the words of the clause which refer to English law do not mean merely the law formerly administered by the late Supreme Court, or now by the High Court sitting as a Court of Ordinary Original Civil Jurisdiction, but are intended to point out a class of cases in which, as between the parties, exclusively English law must be administered.'

"Neither the Court of Small Causes of Súrat nor the parties in this case are governed by English law, nor are the Mofussil Civil Courts considered as Courts of Record. The question then remains to be decided whether a suit between parties, and in a Court not governed by English law, and founded upon a decree of a Court which is not a Court of Record, can be maintained.

"According to the decision of the Calcutta High Court (present Shambhúnáth Pandit and E. P. Levinge, JJ.) in *Ranee Emamun* v. *Hurdyál Sing* (*a*), and according to the decision of Mr. Justice Phear in the case of *Jussorát Khán* v. *Kanye Lall Dey*, quoted by Mr. Thomson in his work on Limitation, p. 243, Appendix A., it would seem that a suit to recover money due on a decree of a Mofussil Court can be entertained by a Mofussil Court; while Chief Justice Peacock and Mr. Justice Hobhouse have decided in *Sandes*

(*a*) Special vol. Calc. W. Rep. Civ. R. 301.

v. *Jomir Shâikh* (*b*) that a suit cannot be maintained to recover money due on any decree of a Mofussil Court. The Honourable the Chief Justice is also reported to have said 'there would be no end to a case if a fresh suit may be maintained upon a decree' (*c*).

"My opinion on the point raised above is, that as there is no statutory provision in Indian law by which a suit upon a decree has been expressly permitted to be brought, and as Sec. 20 of Act XIV. of 1859 enacts that the judgment of a Civil Court not established by Royal Charter shall not be enforced unless some proceedings shall have been taken to enforce such judgment within three years next preceding the application for execution, and as the results which may be attained by the institution of a suit on a decree can as effectually be attained by the procedure prescribed in Sec. 216 of the Code of Civil Procedure, a fresh suit on a decree should not be entertained.

"It certainly seems somewhat anomalous that while we could not object to the institution of a suit in this country on a judgment of a foreign court, we should decline to concede this privilege to our own decrees; but the rules of law regarding the operation of decrees are founded on expediency, and if by an analogous mode of dealing we were to hold that a suit should not be entertained also on the decree of a foreign country, we might in some cases do injustice, whereas no injustice can be caused by our declining to entertain a fresh suit on our own decree, as security is provided against that by the provisions of Sec. 216 of the Code of Civil Procedure.

"As Sec. 32 of the Code of Civil Procedure directs that 'if upon the face of the plaint it appears to the Court that the subject-matter of the plaint does not constitute a cause of action, the Court shall reject the plaint,' and as the decree sued upon does not constitute a cause of action, I have rejected the plaint contingent upon the opinion of the Honourable the High Court. Since writing the above I have had an opportunity of reading the decision of the Honourable

(*b*) 9 Calc. W. Rep. Civ. R. 399. (*c*) Ibid, p. 401.

1869.

MANCHHA'RA'M KALLIA'NDA'S v. BAKSHE SA'HEB mir MAINU'DI'N KHA'N.

the Chief Justice of Madras, and Mr. Justice Jones in *K. Sanjiviá* v. *Nungier*, reported in the *Madras Jurist* for October 1869, page 364. Their Lordships also have decided that a suit on a judgment-debt is not maintainable."

The case was considered by COUCH, C.J., and LLOYD, J.

COUCH, C. J.:—The question referred to us in this case is whether a suit can be maintained in the Small Cause Court of Súrat, upon a decree of the Court of the Principal Ṣadr Amín of Súrat. *Primâ facie* an action lies on the judgment of every Court of competent jurisdiction, the general principle being that the judgment of a Court of competent jurisdiction creates a duty to pay on which debt will lie: *Berkeley* v. *Elderkin* (*d*). I doubt whether the duty thus created is within the terms of Sec. 6 of Act XI. of 1865, namely, "claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages;" but I think the question may be decided on a higher ground. The decree sued upon is the decree of a Court regulated by the Code of Civil Procedure, which contains the amplest provisions for the execution of the decree, not only within the jurisdiction of the Court by which it was passed, but within any part of the British territories in India. As regards the mode of executing this decree, the obtaining a judgment in the Small Cause Court would be no benefit whatever to the plaintiff; in fact he would be in a worse position, as he could not have execution of the judgment of the Small Cause Court upon the immoveable property of the defendant until the Court was satisfied that there was not sufficient moveable property. As a remedy, the action in the Small Cause Court would be futile when the execution of the decree is not barred by the law of limitation, and it is the policy of the law not to allow such actions to be brought. The Legislature has been careful in the Limitation Act to provide that the judgments and decrees of Civil Courts shall be enforced within certain periods, and if an action might be brought upon a judgment or decree which is within those provisions, the law of limitation might

(*d*) 1 E. & B. 805.

1869.
MANCHHA' RA'M KALLIA'NDA v. BA'KSHE SA'HEB mir MAINU'DI'N KHA'N.

be evaded. Where an action on a judgment or decree will not give to the plaintiff a higher or better remedy than he already has, there is no advantage in allowing it to be brought; and it would be contrary to the spirit of the Code of Civil Procedure to do so. Where it will give a higher or better remedy the case is different, and there are cases in which an action may be the only mode of enforcing a judgment or decree. For these reasons I am of opinion the decision of the Judge of the Small Cause Court of Súrat is right.

LLOYD, J., concurred.

Special Appeal No. 206 *of* 1869.

Dec. 1.

DA'JIBA' ANANDRA'V .....*Appellant.*
THE B. B. AND C. I. RAILWAY COMPANY ...*Respondent.*

Trespass to immoveable property—Damages—Quarrying.

Where the defendants without leave quarried on the land of the plaintiff and removed a large quantity of stone therefrom, it was held that the plaintiff was entitled to recover by way of damages the value of the stone after it was quarried, and that the defendants were not entitled to a deduction therefrom of the cost they had incurred in quarrying the stone.

THIS was a Special Appeal from the decision of A. Bosanquet, Judge of the District of Tháṇá, in Appeal Suit No. 432 of 1868, amending the decree of Mádhavráv Sheshgír, Munsif of Dáhánu, in Original Suit No. 689 of 1867.

The Special Appeal was heard before GIBBS and LLOYD JJ., on the 11th of August 1869.

Vishvanáth Náráyaṇ Mandlik for the special appellant.

Latham for the special respondent.

Cur. adv. vult.

1st December 1869—GIBBS, J., in delivering the judgment of the Court said:—

This is a suit to recover from the defendant, the Bombay, Baroda, and Central India Railway Company, a sum of Rs. 2,487-11-8 damages, on account of trespass committed by the latter on certain lands belonging to the plaintiff, and

1869.

DA'JIBA' ANANDRA'V v. THE B. B. AND C. I. RAILWAY COMPANY.

quarrying and carrying away stones therefrom, and otherwise rendering it unfit for purposes of cultivation.

The Munsif of Dáhánu, Azam Mádhavráv Sheshgír, gave judgment for the plaintiff; and directed that he should recover from the defendant Rs. 1,666-10-8, on account of the value of stone, Rs. 576 the amount of mesne profits up to date of judgment, and Rs. 181 for restoring the land to its former state; in all Rs. 2,423-10-8, together with interest at 2 per cent. on the amount, excluding costs of restoration at 2 per cent. per mensem from the date of plaint, and costs, together with interest at the same rate on the whole sum, including costs, from the date of decree up to final liquidation.

Dissatisfied with this decision, the Agent of the Railway Company appealed to the District Judge, who laid down four issues for trial. His first issue was whether the claim was barred by the Law of Limitations. His finding was in the negative, and for the plaintiff. His second issue was what was the value to the plaintiff of the stone taken by the defendant from his land; and his finding was that it was of no value whatever to the plaintiff. The third issue was whether the defendant had rendered the plaintiff's land unfit for cultivation; and, if so, what would it cost to restore it to its former state. The finding upon this was in the affirmative and the sum of Rs. 181 was fixed as the cost of restoration. The fourth and last issue was, whether if the plaintiff was entitled to recover mesne profits, what amount should be awarded to him, and the finding upon this was that Rs. 576 should be awarded. The District Judge accordingly amended the Munsif's decree by admitting the plaintiff's claim to the extent of Rs. 757 only.

Against this decision a special appeal was preferred to the High Court. It was argued before my brother Lloyd and myself on the 11th of August last, and adjourned on that day to enable us to consult Sir Charles Sargent with reference to the case of *Parsharám* v. *B. B.* and *C. I. Railway Company*, tried before him on the original side of this Court. We have consulted Sir Charles Sargent, and we find that his decision

will not assist us in deciding this case. In that case, sitting as a Court of Original Jurisdiction, he found, as a matter of fact that the stone was of no value. We are here sitting in special appeal, Judges of law only, and as such bound to accept the findings of fact recorded by the Judge below. He has found that "at Mahim, four miles from the plaintiff's land, stones fetch one rupee for two cart-loads, and also that the cart-hire would be annas four or five for each cart;" but he added: "Besides that, there is the cost of quarrying the stone, and filling the carts. I cannot see that the plaintiff could sell stone from his field at any profit."

Against this finding it was urged by the special appellant that the Judge below was in error in taking into consideration the cost of quarrying the stone; and the case of *Martin* v. *Porter* (*a*), was quoted as an authority on the point. The circumstances of that case were as follows:—The plaintiff and defendant were adjoining proprietors in a coal district. The defendant had worked his coal mine under the plaintiff's land to an extent exceeding a rood, unintentionally, as is to be inferred, the contrary not being alleged, and had brought up a considerable quantity of coal. Trespass being brought, the defendant supposed the rule of damages to be the value of the coal in the bed, or its market value, less the price of getting it out, and paid into the Court the sum of £133. But Parke, B., who tried the case, said that the plaintiff would have been entitled in an action of *trover* to the value of the coal as a chattel, either at the pit's mouth or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; that not having made such a demand, and this action being trespass, he was entitled to the value of the coal as a chattel at the time when the defendant began to take it away; that is, as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine where they were got to the pit's mouth, *but not the cost of quarrying*

(*a*) 5 M. & W. 351.

1869.

DA'JIBA' ANANDRA'V v. THE B. B. AND C. I. RAILWAY COMPANY.

the stone. This principle was affirmed in appeal. Lord Abinger said: "It may seem a hardship that the plaintiff should make this extra profit of the coal; but still the rule of law must prevail." Parke, B., added: "I am not sorry this rule is adopted; it will tend to prevent trespasses of this kind, which are generally wilful."

Applying the principle laid down in *Martin and Porter*, we find that the Judge below was in error in taking into consideration the cost of quarrying the stone; and we must therefore reverse his decision, and remand the cause for him to determine the value of the stone, excluding the cost of quarrying it.

Decree reversed and case remanded.

Dec. 1.

Special Appeal No. 330 *of* 1869.

SAKHO NA'RA'YAN KHANDA'LKAR .....*Appellant.*
NA'RA'YAN BHIKA'JI' KHANDA'LKAR .....*Respondent.*

Jurisdiction—Act XIV. of 1869*—Appellate powers—Assistant Judge—Correction of an error of law in a decree—Coparceners—Limitation—Reg. V. of* 1827.

A decision passed on appeal from a decision of a Munsif by an Assistant Judge, subsequent to the date on which Act XIV. of 1869 came into operation (14th March 1869), and prior to the date on which the Assistant Judges in the Bombay Presidency were invested with appellate powers under the Act (4th April 1869), is not illegal, as the Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, under which the Assistant Judges had power to hear appeals.

Also, when the parties neglect to get an error of law in a decree of the High Court corrected by a review, the High Court will decline to correct it when the case comes up before them again in a subsequent Special Appeal.

Also, when Hindú coparceners have, for a period of more than thirty years, held shares different from those which as such coparceners they would be entitled to by law, and no separation is proved between the parties, the coparcener holding less than his proper share can sue to recover his full quantum, and his claim is not cancel either by Reg. V. of 1827 Act XIV. of 1859.

THIS was a Special Appeal against the decision of J. R. Naylor, Assistant Judge at Ratnágirí in Appeal Suit No. 435 of 1865, amending the decree of the Munsif for Vingulá.

1869.

SAKHO NA'RA'YAN KHANDA'LKAR v. NA'RA'YAN BHIKA'JI' KHANDA'LKAR.

The special appeal was heard before GIBBS and MELVILL, J.J.

Shántárám Náráyan appeared for the appellant.

Bhairavanáth Mangesh appeared for the respondent.

The facts, in so far as they are material, appear from the following judgment delivered by

GIBBS, J.:—This case has been before the High Court on several occasions. On the last remand the Assistant Judge arrived at the same conclusion as the Joint Judge had arrived at before, adding merely a provision "that the plaintiff shall recover from the defendants a half share of the proceeds of the Rewandi estate, until such time as the partition is effected, and he is put in separate possession of his half share."

At the last hearing of the special appeal on the 19th October, Mr. Shántárám Náráyan argued that Mr. Naylor, the Assistant Judge, had no jurisdiction to try the appeal, as at the date of trial he was not vested with appellate powers under Sec. 17 of Act XIV. of 1869. Mr. Shántárám's objection was not allowed, as we were of opinion, following the principle laid down in the Full Court Decision in the case of (*Ratanchand* v. *Hanmantráv*, (*a*) that the decision passed on appeal from a decision of a Munsif by an Assistant Judge subsequent to the 14th of March 1869 (the date on which Act XIV. of 1869 came into operation), and before the 4th of April 1869 (when the Assistant Judges had appellate powers conferred upon them under the Bombay Civil Courts' Act) was not illegal, as the said Act did not alter the procedure as regards appeals against decisions passed by Courts constituted under the old Regulations, and under those Regulations the Assistant Judges had powers to hear appeals.

At the last hearing it was also noticed that when this case was before the High Court last, in the shape of Special Appeals Nos. 52 and 66 of 1867, the Divisional Bench were in error in holding that Reg. V. of 1827 was a law of prescription and not of limitation, and that therefore the

(*a*) Ante p. 166.

1869.

SAKHO NA'RA'YAN KHANDA'LKAR v. NA'RA'YAN BHIKA'JI' KHANDA'LKAR

plaintiff could not, under Clause 2, Section 7, derive any benefit from the reference to arbitration, and *Jéwájeé* v. *Trimbuckjee and Jagoji* (*b*) was quoted as an authority. On this we may observe that this case was not cited when the last remand order of the High Court was made, and that the proper course to get any error corrected was by a review. And although we wish we could allow a review in this case, for the reference to arbitration would save the limitation, we think that it is too late now, and that it would not be advisable to allow a proceeding which might establish a precedent leading to open up any case at any future time.

The only point we have now to decide therefore is, whether when coparceners have held for more than thirty years shares different from those to which as such coparceners they would be entitled on a formal partition, each of them acquires a prescriptive title to the portion so held by him, or, whether if he holds less than his proper share, he can claim to recover his full quantum. It was conceded in the argument that if this suit had been brought under the new law of limitation it would not have been barred, for under that law possession of a share by a coparcener is in the nature of a payment; but the suit having been instituted under the old law, the question of limitation must be decided thereby. The case cited by Mr. Shántárám (*Máhipatráv* v. *Moro*, S. A. No. 402 of 1865, decided by TUCKER and WARDEN, JJ., on the 18th of August 1866,) does not apply. In Special Appeal No. 2,871, the late Ṣadr Adálat had, on the 15th of January 1853, held that if a claimant is proved to be one of the *bháuband* of the defendants, no lapse of time since the active enjoyment of the privileges would bar his claim to such a share as he would be entitled to. Latterly, however, this principle had been departed from, for, in *Gudhur Rushotuna* v. *Govind* (*c*) Keays, Hart, and Hebbert, Puisne Judges, held, that "in a suit for a division of family property, if the party in possession can show thirty years of such possession uninterrupted and as proprietor, and further, that during this time the party claiming has never derived any profit from, or

(*b*) 3 Moo. Ind. App. 138.
(*c*) 7 Harrington 371.

recovered any part of the proceeds of the property in dispute, then such possession is good proof of a separation of interests, and will bar the action." This principle was followed by the High Court in *Ráné* v. *Ráné* (*d*,) Between these cases and the case before us, there is however this distinction: In the former the party claiming was out of possession altogether; and therefore, according to the ruling of this Court in *Gurávi* v. *Gurávi* (*e*) it would not be necessary that actual separation should be proved. It would be enough to show that the defendants had been in uninterrupted possession for more than thirty years. But in the class of cases similar to the one before us, where both parties are in possession of portions, we should require a definite finding as to whether there had or had not been partition between the parties. In this particular case we have a clear finding that no partition was made, and that each party is in possession of a portion of the entire estate, either by mutual agreement or accidental circumstances. In this view of the matter we consider the suit not barred, and we confirm the Lower Court's decree.

Referred Case.

Dec. 7.

LACHHMAN JOHA'RIMAL .....*Plaintiff.*
BA'PU' KHANDU, and TUKA'RA'M KHANDOJI'.*Defendants.*

NANDRA'M SARDA'RMAL.....*Plaintiff.*
BHAVA'NI HA'IBATI, and BHA'U TUKA'.....*Defendants.*

Surety—Liability of surety to be such.

Held, that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety it may be enforced in the same manner as a decree for any other debt.

THIS was a reference under Act X. of 1867 from J. L. Warden, Judge of the Court of Small Causes at Ahmednagar, for the opinion of the High Court.

(*d*). 3 Bom. H. C. Rep. A. C. J. 173. (*e*). Ibid. 170.

1869.

LACHHMAN JOHA'RIMAL v. BA'PU' KHANDU' and Surety TUKA'RAM KHANDOJI'.

"I have the honour to solicit the opinion of Her Majesty's High Court of Judicature on the subject of the liability of sureties, the judgment-creditors in two suits decided in this Court (Nos. 2,121 of 1866 and 2,732 of 1868) having presented applications for the imprisonment of the sureties to the bonds on which they sued.

"The Madras High Court ruled in a case referred to in Norton's Topics of Jurisprudence, page 365, that the creditor was bound to exhaust his remedy against the principal debtor before his right against the surety arose; and it is stated in the *Times of India* of the 6th November 1869 that the same Court has lately ruled that a surety cannot be imprisoned under any circumstances.

"The practice of this Court has been to restrain a judgment-creditor from recovering from a surety until he has exhausted his remedy against the principal. Failing to recover from the principal, he is allowed to go the length of imprisoning the surety alone to obtain satisfaction of his decree.

"In England as long as imprisonment for debt existed, I believe that the surety was held to be liable to be sued in the first instance, and that he was not protected by the solvency of the principal. If in this view I am correct, I think that, by parity of reasoning, the surety should be liable to imprisonment while the principal is at large."

PER CURIAM (COUCH, C.J., and MELVILL, J.):—The Court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt.

Special Appeal No. 412 *of* 1869. 1869. Dec. 7.

VAKU' valad RA'M PA'TI'L .....*Appellant.*
PA'ND valad MA'LJI' PA'TI'L, *et al*.....*Respondents.*

Agreement to officiate as pátil—Public policy—Vacating office.

An agreement between two members of a pátíl family that they are to officiate in turns is not illegal as being opposed to public policy. The Court will not however compel the actual pátíl to vacate office under such an agreement as long as his appointment under Act XI. of 1843 is unrevoked.

THIS was a Special Appeal from the decision of S. N. Tagore, Assistant Judge, Khándesh, in Appeal Suit No. 115 of 1869, confirming the decree of the Munsif of Tengorá

The plaintiff, Vakú Pátíl, brought this suit to establish his right to officiate as pátíl of Sonápúr alternately with the defendants, and to cause the defendants to give over charge of the office to him in accordance with the terms of an agreement dated the 27th of January 1862. The agreement was to this effect: "Pándú Pátíl has been appointed by the Government in succession to his father. Pándú has spent two hundred rupees to obtain the order of appointment, out of which sum one-half is to be borne by him, and one-half by Vakú. Hereafter the two are to officiate in turns Pándú should give up when called upon by Vakú."

The defendants denied that they had executed the agreement relied upon by the plaintiff, and further alleged that they had been appointed by the Collector for life, as belonging to the elder branch of the family, and that the plaintiff had never held the office of pátíl.

The Munsif of Tengorá found that there was no evidence to show that the plaintiff and defendants were entitled to officiate by turns; and that the agreement relied upon was not proved He accordingly rejected the claim of the plaintiff.

The plaintiff appealed from this decision to the District Court; and S. N. Tagore, the Assistant Judge, held, that no usage or custom was established showing that the plaintiff was entitled to claim performance of the pátíl's duties by turns with the defendants. "Where," he said, "no such right to

1869.

VAKU' valad RA'M PA'TI'L v. PA'ND valad MA'LJI' PA'TI'L. *et al.*

claim performance exists, the Collector has, under Sec. 4 of Act XI. of 1843, an absolute power to nominate any member of the family to act as pátíl, and the consent of the plaintiff to such nomination was not necessary under the circumstances. The agreement also, though proved to have been duly executed, is directed in its spirit against public policy, being inconveniently restrictive of the choice of the Collector of a competent person to the office, and is therefore invalid." The Assistant Judge accordingly confirmed the Munsif's decree.

The plaintiff appealed from this decision, and the appeal was heard this day before WARDEN and MELVILL, JJ.

Nánábhái Haridás for the appellant:—The agreement is not illegal. The Collector has an absolute power to appoint only when the sharers, having been asked to nominate, fail to do so, and cannot agree. As between the parties, the plaintiff has a right to claim alternate performance of the duties of this office, for the agreement is shown to have been duly executed.

PER CURIAM:—We do not think that the agreement relied upon by the plaintiff is either illegal or contrary to public policy. We amend the decree by declaring that the plaintiff is entitled under the agreement to a half share in the *pátíl-ki vatan* as claimed, but we reject his claim to officiate, as the defendant, Pándú, cannot be compelled to vacate office so long as his appointment is unrevoked.

Decree amended with costs on appellant.

Dec. 13.

Special Appeal No. 379 *of* 1869.

GANESH PA'NDURANG A'GTE ..... *Appellant.*

GANGA'DHAR RA'MKRISHNA ..... *Respondent.*

Procedure—Objections taken by respondent—Civ. Proc. Code, Sec. 348.

A respondent in taking advantage of the provisions of Sec. 348 of the Civil Procedure Code, can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties who do not appeal, he must do so by independent appeal.

THIS was a Special Appeal from the decision of R. F. Mactier, District Judge of Satárá, in Appeal Suit No. 13 of 1869, amending the decree of the Munsif of Mayni.

The plaintiff, Gangádhar Rámkrishṇa sued Lakshmibái, Kásibái, and Páṇdurang Agte, the father of the appellant, to recover Rs. 79-5, being part of an annual payment of 200 rupees agreed to be made to the plaintiff by the defendants Lakshmibái and Kásibái, in satisfaction of a debt of Rs. 2,000 due on a bond dated February 1862, and payable out of the revenues of the village of Hingangáon, the whole of which village, without any reservation of the plaintiff's rights, had been attached by the third defendant, Páṇdurang Agte in the year 1865, in execution of a decree he had obtained against Lakshmibái and Kásibái. The plaintiff claimed to recover the balance for the year 1864, and to establish his right to have the annual payment of Rs. 200 continued to him out of the revenues of the attached village till his debts were satisfied.

The defendant Lakshmibái admitted the bond, but pleaded want of consideration. The defendant Kásibá admitted the bond, and the defendant Páṇdurang answered that the bond was without consideration.

The Munsif of Mayni found that the bond was proved, and that consideration was shown for its execution. He further found that Rs. 200 had been yearly paid to the plaintiff out of the revenues of the village which the third defendant had attached, but decreed the claim against Lakshmibái alone, laying the whole costs on her.

Lakshmibái appealed against this decree to the District Court; and the Judge held that the claim was improperly brought against her and Kásibái, who should never have been made parties to the suit, as they never refused to pay according to the agreement. He further was of opinion that the third defendant, Páṇdurang, in attaching the whole village without reservation of the plaintiff's rights as mortgagee, took on himself the liability of paying the permanent annual mortgage charges with which the village was burdened when the attachment took place. He directed accordingly that the third defendant, Páṇdurang, being dead, his son, Gaṇesh Páṇdurang, should be joined as a party to the appeal, and made a respondent.

1869.

GANESH PA'NDURANG AGTE. v. GA'NGADHAR RA'MKRISHNA.

Gaṇesh Pánḍurang was accordingly joined, and the Judge found Gaṇesh was liable for the balance sued for the year 1864. He accordingly amended the Munsif's decree, and directed that Gaṇesh Pánḍurang should pay the unpaid balance, and the costs of all parties to the suit.

The defendant, Gaṇesh Pánḍurang, appealed from this decision, and the appeal was argued before GIBBS and MELVILL, JJ., this day.

Bhairavanáth Mangesh for the appellant:—The Judge has, I submit, illegally made Gaṇesh Pánḍurang a respondent. As neither Gangádhar nor Lakshmibái has appealed against Gaṇesh Pánḍurang, the Judge was wrong in awarding the claim against him under the provisions of Sec. 348 of the Code of Civil Procedure.

Shántárám Náráyaṇ for the respondent:—The Lower Court had a discretion in bringing the unrepresented parties before it in appeal either as appellants or respondents. The words of Sec. 348 do not confine objections on the part of a respondent to those which he can urge against the party appealing.

PER CURIAM:—The District Judge was in error in directing (without an appeal from the plaintiff Gangádhar) in an appeal by the appellant Lakshmibái, that Gaṇesh Pánḍurang, who was co-defendant with Lakshamibái in the original suit, and was identical in interest with her, should be made a party to the appeal as a respondent; and in awarding the whole claim against Gaṇesh Pánḍurang the Judge made an award beyond what the parties themselves required. Where a respondent takes advantage of the provisions of Sec. 348, he can only take such objections as have reference to the party appealing; but he cannot, except by bringing an independent appeal, raise objections against parties who do not appeal. We accordingly reverse the decision of the Lower Appellate Court, and suggest that the District Judge might still admit an appeal from Gangádhar against the Munsif's decree, absolving Gaṇesh Pánḍurang. We direct the parties to bear their own costs.

Decree reversed.

1869.
Dec. 17.

Special Appeal No. 404 *of* 1869:

TUKA'RA'M AMBA'IDA'S .....*Appellant.*
RA'MCHANDRA valad BHIMANNA' DHUGI' ...*Respondent.*

Hindú law—Sale of undivided property.

On this side of India a member of an undivided Hindú family can, without the consent of his coparceners, sell his share in the undivided property.

THIS was a Special Appeal from the decision of S. H. Phillpots, Senior Assistant Judge at Solápúr, in Appeal Suit No. 21 of 1868, amending the decree of the Munsif of Solápúr.

The plaintiff, Tukárám, brought this action to recôver a house sold to him under a deed of sale made in 1857 by Bhimanná, deceased, the father of Viṭhobá, also deceased, and of Rámchandra. The house was subsequently let by the plaintiff to Viṭhobá and Rámchandra, who the plaintiff alleged, executed a rent note. The defendant, Rámchandra, set up a claim to occupy the house in his own right, and not as a tenant, and the plaintiff therefore prayed that the house might be awarded to him as the owner thereof.

The mother and guardian of Viṭhobá's minor son did nôt appear.

The defendant, Rámchandra, answered that he occupied the house in his own right, and not on behalf of the plaintiff; that the house being ancestral family property, his father had no right to sell without his consent his half share in the house; and, lastly, that he did not execute either the alleged deed of sale or the rent-note.

The Munsif of Solápúr found that Tukárám was owner of the house, and that the defendant occupied the house as his tenant, and accordingly decreed for the plaintiff.

The defendant appealed to the Assistant Judge of Solápúr, who reversed the Munsif's decree, and remanded the suit for trial on two new issues framed by him: 1st, whether the property was or was not ancestral; and, 2ndly, whether the

1869.

TUKA'RA'M AMBA'IDA'S v. RA'MCHANDRA valad BHIMANN'A DHUGI'.

brothers Viṭhobá and Rámchandra were divided in interest at the time of the sale, and had separate shares.

The Ṣadr Amín of Solápúr, before whom the suit came to be tried on remand, decreed for the plaintiff, holding that the house was not ancestral property, and that the consent of the sons was not necessary to a valid sale by their father Bhimanná; and on the second issue that the two brothers were not divided in interest; and that the defendant, Rámchandra, did not live separate from his father, and had no separate share.

The defendant again appealed to the District Court, and the Senior Assistant Judge, S. H. Phillpots, held that the house was not shown to be self-acquired; and as Rámchandra Viṭhobá, and Bhimanná were members of an undivided family, Bhimanná, the father, could not sell, in the absence of any proof of common family necessity, his son Rámchandra's share of the ancestral property. Viṭhobá and Rámchandra were brothers, and as Viṭhobá acquiesced in the sale made by his father, and Rámchandra did not consent, and did not execute the deed or the rent-note, the Assistant Judge held that the sale of Rámchandra's half share in the house, being without his consent, was invalid, and accordingly amended the Ṣadr Amín's decree.

From this decision the plaintiff appealed, and the appeal was heard before WARDEN and MELVILL, JJ.

Nánábhái Haridás for the appellant:—Rámchandra was living with his father Bhimanná, and his brother Viṭhobá. The actual execution by one of, and the acquiescence by the other in, the deed of sale and rent-note are admitted. Rámchandra therefore lived as a tenant in the house. The sale by the father is valid to the extent of his own share: *Palanivelappá Kaundan* v. *Mannaru Naikan* (*a*); and Viṭhobá, one of the brothers, was a consenting party. The appellant is therefore entitled to two-thirds of the house.

Dhirajlál Mathurádás for the respondent:—It has been ruled by this Court in *Gangubái* v. *Rámanná* (*b*) that a

(*a*) 2 Mad. H. C. Rep. 416. (*b*) 3 Bom. H. C. Rep. A. C. J. 66.

member of an undivided Hindú family cannot, without the consent of his coparceners, make a gift of his share in the undivided property, or dispose of it by will. The sale by the father was therefore invalid, even to the extent of his own share.

Nánábhái Haridás, in reply, cited *Gundo Mahádev* v. *Rámbhaṭ bin Bháubhat* (*c*), and *Damodhar Viṭhal* v. *Dámodhar Hari* (*d*).

PER CURIAM:—The facts found by the District Judge are that Bhimanná and his sons Viṭhobá and Rámchandra were an undivided family, and that Bhimanná with the consent or acquiescence of Viṭhobá, but without Rámchandra's consent, sold the family house to the plaintiff. Under these circumstances the Judge has awarded a half share of the house to the plaintiff, who appeals, on the ground that he is entitled to the whole house. On the other hand it is contended for the respondent that the sale was invalid, since a member of an undivided family cannot, without the consent of his co-sharers, alienate even his own share of the family property. The authority relied upon in support of this proposition is the case of *Gangubái* v. *Rámanná* (*supra*). We think that the decision in that case went no further than to declare that a member of an undivided family cannot, without consent of coparceners make a *gift* of his share, and that it in no way affected the previous decision of this Court that a member of an undivided Hindú family can sell his own share of the family property: *Dámodhar Viṭhal* v. *Dámodhar Hari* (*supra*). We hold, therefore, that the sale to the plaintiff is valid as regards the share of Bhimanná, and invalid as regards the share of Rámchandra. We accordingly amend the decree, by decreeing two-thirds of the house to the appellant.

Decree amended.

(*c*) 1 Bom. H. C. Rep. 39. (*d*) Ibid. 182.

1869.
Dec. 21.

Special Appeal No. 368 *of* 1869.

SITA'RA'MBHAT, *et al* .....*Appellants.*
SITA'RA'M GANESH and KA'SHIRA'J NA'NA'BHAT, by his father NA'NA'BHAT...*Respondents.*

Hindú law—Inheritance—Hereditary priestly office—Alienation—Fees attached to office—Father suing on behalf of his son—Certificate of administration—Act XX. of 1864, *Sec.* 2.

Where a priest wrongfully officiates for another, and receives fees, he is bound to account for them to the rightful priest, where such fees are by custom attached to the office.

The sale of an hereditary priestly office will be upheld where the purchasers are the next in succession from the vendor to such office.

Semble, that an hereditary priestly office descends in default of males through females.

A father, suing on behalf of his minor son entitled to property in his own right, must obtain a certificate of administration under Sec. 2 of Act XX. of 1864.

THIS was a Special Appeal from the decision of A. Richardson, Judge of the Ahmednagar district, in Appeal Suit No. 11 of 1869, reversing the decree of the Munsif of Sinner.

Sitárám Gaṇesh, and Nánábhat, on behalf of his minor son Káshiráj, brought this suit for one-third share of the emoluments and office of *mule joshi* in the village of Vadgám, which they claimed to have purchased under a deed of sale from Lakshuman Gaṇesh on the 21st of February 1868.

Lakshuman Gaṇesh, the vendor of the plaintiffs, was proprietor of a one-third share of the office, being separate in interest from the three defendants, who were owners of the remaining two-thirds. The plaintiffs were themselves sons of the daughter of Lakshuman Gaṇesh, the vendor, and his only heirs; and as the office was held in rotation by each of the three sharers, they now sued to restrain the defendants from obstructing their enjoyment of the *vatan* during their turn of office.

The defendants answered that the obstruction complained of was caused by the villagers generally, and that the defendants were not concerned in it; and, secondly, that it was not competent, according to Hindú law, for a person to sell an hereditary priestly office. They further pleaded

1869.

SITA'RA'M-BHAT, *et al.* v. SITA'RA'M GANESH and KA'SHIRA'J NA'NA'BHAT, by his father NA'NA'BHAT.

that one of the plaintiffs was a minor, and could not be represented for the purposes of the suit by his father without a certificate of guardianship.

The Munsif of Sinner rejected the plaintiffs' claim, on the ground that Lakshuman Ganesh, the vendor of the plaintiffs, was incompetent to sell his share of an hereditary priestly office.

The plaintiffs appealed from this decision to the Court of the District Judge, who, in reversing the Munsif's decree, delivered the following judgment:—

"It appears that Sitárám, plaintiff, on his own behalf, and Nánábhat, on behalf of his son Káshiráj, purchased for 500 Rupees from Lakshuman Ganesh, the owner, one-third of the office of *joshi* and *mule* at Wadgám, under a deed of sale dated 21st February 1868.

"It is admitted clearly in evidence that Rámbhat, defendant No. 2, owns one share, Lakshuman Ganesh owned another, and defendants Nos. 1 and 3 own the remaining third of the office of *mule joshi*.

"Defendant's plea is, that while male relations survive the sons of daughters do not succeed; and that a sale of an hereditary office is altogether opposed to Hindú law. Lakshuman Ganesh is admitted by defendant No. 2, Rámbhat, his second cousin, to be separated from his co-heirs. If separated from his co-heirs, the property of a Hindú dying without male issue descends to his wife, and after her to his daughters, and thence to the daughter's sons. According to the evidence given by Lakshuman Ganesh, plaintiff would succeed to any property he may be possessed of. Defendants are not in a position to plead incompetency in a separated co-sharer to sell his share, for defendants Nos. 1 and 3 obtained their share of the office by sale from its owner, who was a relative four times removed from the other defendants. In this case the office was sold to the grandsons by the daughter, who alone could succeed to Lakshuman Ganesh's share.

"My finding on the first issue therefore is, that it does

1869.

SITA'RA'M-BHAT, *et al.* *v.* SITA'RA'M GANESH and KA'SHIRA'J NA'NA'BHAT', by his father NA'NA'BHAT.

appear that sharers who are separated from their co-heirs, and without male issue, are competent to sell their shares in an hereditary priestly office to a connection."

The Judge accordingly decreed the claim as stated in the plaint.

The appeal was heard before COUCH, C.J., and WARDEN, J.

Pánḍurang Balibhadra for the appellants: I.—Káshiráj, one of the plaintiffs in the original suit, being a minor, his father, Nánábhat, could not sue without obtaining a certificate of administration, under Sec. 2 of Act XX. of 1864. II.—In the case of *Pánḍoorung Succarám* v. *Bálumbhut* (*a*), the subject of the suit was the *joshi haks* in the village of Newassa, in the Ahmednagar district, and the plaintiffs, as *joshis*, sued the defendants, at whose houses they claimed a right to officiate on marriage occasions, for fees paid by the defendants to their own family priests. It was there held that it was optional with parties to adopt the ceremonies for which the *haks* were due, and that the amount of the fees, being a voluntary contribution, depended on the will or ability of the donor. This case must be governed by the same principles. III.—The plaintiffs in this case are not descended from the vendor in the male line; they are grandsons by the daughter, and from the nature of the priestly office, daughters cannot officiate, neither can their sons succeed to the office. IV.—This is a question for the caste, and the Courts of law will not compel the caste people to accept a priest whom they are unwilling to acknowledge: *Murár Dayá* v. *Nágria Ganeshia* (*b*).

Bhairavanáth Mangesh for the respondents:—The right to officiate as a priest is like other rights descendible in the ordinary way, and daughter's sons can inherit such an office. In *Nurbhcrám Tooljarám* v. *Bháeedas* (*c*) the claim of the plaintiff was for the office of head priest of the caste. In that case the alienation of the office by one Bái to the grandson of her own sister was held binding; but the deci-

(*a*) Cases decided by S. D. A. 1820-1840, p. 196.
(*b*) 6 Bom. H. C. Rep. A. C. J. 17
(*c*) 2 Borr. 188 (ed. of 1863).

1869.

SITA'RA'M-BHAT, *et al.* v. SITA'RA'M GANESH and KA'SHIBA'J NA'NA'BHAT', by his father NA'NA'BHAT.

sion rested on the ground of acquiescence. In Steele's Summary it is said, p. 89-90, that the office of a *vyavahár joshi* may be alienated and farmed out.

Cur. adv. vult.

COUCH, C. J.:—It is settled law that if a person usurps the office of another, and receives the fees of the office, he is bound to account to the rightful owner for them. Where the payments are merely voluntary the case is different, and no suit can be brought. The persons who paid the fees were before the Court as defendants in the case cited, and that decision does not apply. It is contrary to equity to make the *yajmáns*, in this case the villagers generally, pay twice. The parties who have wrongfully received the fees are properly liable to pay them over to the parties entitled to them.

With regard to the other point, whether there was a valid sale, it is not necessary in this case to decide the question as to whether such offices can be sold to strangers. In this case the purchasers were grandchildren, who would eventually succeed to the office as heirs, and the grandfather did nothing more than relinquish his right in their favour. There have been previous dealings with this office of a somewhat similar nature, which is some evidence of a usage justifying the alienation in the present case.

Upon the third point, as to whether Káshiráj, the minor plaintiff, could be properly represented by his father for the purpose of instituting this suit, it is to be observed that the language of the Act is general, and includes the case of a minor having become entitled to property whilst his father is living, and it is therefore necessary that the minor's father should obtain a certificate of administration before instituting or defending a suit connected with the minor's estate.

The decree of the District Court is wrong on this point, as the minor plaintiff is without a certificated administrator of his property. The claim of the plaintiff is accordingly thrown out without prejudice to the plaintiff's right to sue by a properly appointed administrator of the property.

WARDEN, J., concurred.

Decree reversed.

1869.
Dec. 22.

Special Appeal No. 396 *of* 1869.

NANDVALLABH, by his Guardian HARGOVAN. *Appellant.*
ALLIBHA'I ISYA'GANI ..... *Respondent.*

Limitation—Plaint presented during vacation.

Where a plaint was presented to a kárkun left in charge of a Court during vacation, and the cause of action on which the suit was brought became barred before the vacation ended, *it was held* that as the Judge was the proper person to receive plaints, the presentation to the kárkun was invalid, and did not prevent the period of limitation from running.

THIS was a Special Appeal from the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit, No. 10 of 1869, reversing the decree of the Munsif of Jámbúsar.

This action was brought by Hargovan, who was the uncle, and sued as guardian of Nandvallabh, minor son of Mithálá Bhanábhái, to recover Rs. 643-11-3, balance due of principal and interest on a bond dated the 13th of May 1865.

The plaint was presented on the 11th of May 1868 to the chief kárkun of the Munsif's Court, who was left in charge while the Court was closed during the six weeks' vacation. When the Munsif returned after vacation, he found that the suit was on behalf of a minor, and that the person who presented the plaint had not obtained any certificate of administration to the minor's property. As an application for such certificate had been made in 1867, the Munsif granted time to Hargovan to produce it before he registered the plaint. The certificate was obtained on the 28th of July 1868, and the plaint was registered on the 26th of August following. The defendant urged that the suit was barred by lapse of time, as the plaint had been registered after the three years' limitation had expired on the 13th of May 1868; and, further, that the plaint had been presented by an unauthorized person, who had not obtained a certificate of guardianship at the date of presenting the plaint.

The Munsif of Jambúsar held that though the plaint was registered after three years from the date of the bond, yet

it was presented in time, as an application for a certificate had been made long before the filing of the suit, and the certificate had been obtained at the time of the registration of the plaint. He held upon the merits that the bond was proved, and decreed for the plaintiff.

The defendant appealed from this decision to the District Court, when the District Judge laid down the following issues:—

(1) Was the plaint instituted within time?

(2) Was it competent, under the circumstances, for the plaintiff, Hargovan, to present the plaint, or for the Court to receive it?

He said that "Sec. 25 of the Civil Procedure Code required that all suits should be commenced by a plaint presented to a Court. On the 11th of May 1868, when this plaint was presented, the Court was closed during the vacation. If holidays were *dies non juridici*, the alleged presentation to the *sheristedár* in charge of the office was not a valid presentation. The vacation did not end till some days after the expiry of the three years." The Judge therefore held that the plaintiff's remedy was barred. He also held that Hargovan had no right to institute the action, under Sec. 2 of Act XX. of 1864, and that the Munsif, instead of granting him time, was bound at once to have rejected the plaint under Sec. 32 of the Civil Procedure Code.

The Judge accordingly reversed the decree of the Munsif. The plaintiff appealed from this decision, and the appeal was heard before COUCH, C. J., and MELVILL, J.

Nánábhái Haridás for the appellant.

Dhirajlál Mathurádás for the respondent:—The law requires that presentation be made to the Court; for presentation is followed by verification, which can only take place before the Court. If the period of limitation expires during vacation, the presentation must be made before the vacation commences: *Rajkisto Roy* v. *Denobhundoo Surmah* (*a*).

(*a*) 3 Calc. W. Rep. S. C. C. Ref. 5.

1869.

NANDVAL-LABH, by his Guardian HARGOVAN v. ALLIBHA'I ISYA'GANI.

COUCH, C. J.:—The person to whom the plaint was presented was not authorized to receive plaints. The Court was closed for the vacation, and at that time therefore the plaint could not be presented to the Court as required by Sec. 25 of the Civil Procedure Code. Great mischief might arise if a person left, as it is called, in charge, could, in the absence of the Judge, receive plaints, and by an endorsement thereon prevent the operation of the law of limitation. The plaint cannot be considered to have been duly presented until the opening of the Court on the first day after vacation. The Judge was therefore right in considering the claim to be barred, and on this ground we confirm the decree.

MELVILL, J. concurred.

Decree confirmed with costs.

Sept. 7.

Referred Case.

ANPU'RNA'BA'I .....*Plaintiff.*
SAKHA'RA'M JAGANNA'TH .....*Defendant.*

Small Cause Court—Cause of Action—Defendant living outside jurisdiction—Act XXIII. of 1861, *Sec.* 4.

The provisions of Sec. 4 of Act XXIII. of 1861 are applicable to Courts of Small Causes in the Mofussil.

CASE referred for the opinion of the High Court by the Judge of the Court of Small Causes at Puṇá, under Act X. of 1857.

"Anpúrnábhái, the widow of Keshávráo Jagannáth, presented this plaint, suing Sakhárám Jagannáth and three other brothers of her deceased husband for arrears of maintenance for one year. One only of the defendant's brothers is alleged to live within the jurisdiction; the others are stated to reside beyond the jurisdiction in Khándesh, and in Sind.

"Act XI. of 1865 declares, in Sec. 6, what suits are cognizable by Courts of Small Causes, and in Sec. 8 it provides that 'Courts of Small Causes may try all such suits

as are cognizable by such Courts, if the defendant, at the time of the commencement of the suit, shall dwell or personally work for gain or carry on business within the local limits of the jurisdiction of the Court; or if the cause of action arose within the said local limits, and the defendant, at the time of the commencement of the suit, shall by his agent or servant carry on business or work for gain within those limits.'

"The jurisdiction of the Court does not arise, unless all the defendants in a suit at its commencement dwell or work for gain, or carry on business within the local limits assigned to it.

"It is contended for the plaintiff that the authority of the High Court may be obtained, under Sec. 4 of Act 23 of 1861; but I doubt whether this section is applicable to suits brought in this Court.

"Sec. 47 of Act 11 of 1865 extends the provisions of the Code of Civil Procedure to suits instituted in Courts of Small Causes, but only so far as they are or may be applicable, excluding expressly their application in matters provided for in the said Act; and as the jurisdiction of such Courts is restricted by Sec. 8 to suits in which the defendant dwells or works for gain, or carries on business within the local limits assigned to such Courts, Sec. 4 of Act 23 of 1861 does not, in my opinion, apply to a suit brought in this Court.

"I therefore submit, for the consideration of the High Court, the question whether Sec. 4 of Act XXIII. of 1861 is applicable to suits brought in a Court of Small Causes."

PER CURIAM (COUCH, C.J., LLOYD and MELVILL, JJ.) —The Court concurs with the Calcutta and Madras High Courts in considering that Sec. 4 of Act XXIII. of 1861 applies to a suit brought in a Small Cause Court. An order should be made under that section, authorising the trial of this suit in the Court of Small Causes at Puṇá.

1869. Sept. 29.

Special Appeal No. 37 of 1869.

KRISHNA'PA' valad SANTU'.....*Appellant.*

PANCHA'PA' valad GURPADA'PA', *et al*..... *Respondents.*

Sale of immoveable property by Court—Setting aside sale—Suit to recover back purchase-money—Civ. Proc. Code, Sec. 258.

A purchaser at a Court's auction sale (not set aside under the provisions of the Code of Civil Procedure), who has been ejected from the property he has purchased, cannot recover back the purchase-money from the judgment-creditor, there being no warranty on the part of the latter that his judgment-debtor had any interest in the property sold.

Dhóndu v. *Rámji* (4 Bom. H. C. Rep. A. C. J. 114) commented on.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Senior Assistant Judge at Solápur, in Appeal Suit No. 110 of 1868, reversing the decree of Krishnáráv Sadáshiv, Ṣadr Amín of Solápúr, in Original Suit No. 8 of 1867, awarding the plaintiff's claim.

The facts sufficiently appear from the judgments.

The Special Appeal was argued in April 1869 before GIBBS and LLOYD, JJ.

Shántáram Náráyaṇ for the appellant.

Bhaṛiavanáth Mangesh for the respondents.

Cur. adv. vult.

29th September—GIBBS, J.:—This is an action, by the purchaser at a Court's auction, to recover possession of a house, which he there purchased, or to receive back the purchase-money, he having been dispossessed of the property in a suit brought by one Bábá, who established his title thereto. The Munsif awarded the purchase-money with interest, but the Senior Assistant Judge, on the authority of the case of *Dhóndú* v. *Rámji* (*a*), held that plaintiff could not recover the purchase-money, and rejected the claim. The defendants in the present suit were the plaintiffs and judgment-creditors in the suit under which the sale took place.

In the present case it is sought to re-open the question disposed of in the case of *Dhóndú* v. *Rámji* above quoted, and the case of *Greesh Chunder Pottar* v. *Lookhooda*

(*a*) 4 Bom. H. C. Rep. A. C. J. 114.

Moyee Dabee (*b*), in which the Calcutta High Court, under circumstances similar to those of the present case, decreed the return of the purchase-money, as also some observations which fell from the learned Chief Justice and Sir Charles Sargent in the case of the *Bank of Hindustan* v. *Premchund Raichund* (*c*), are brought forward in support of the special appellant's case.

Now, with reference to the Calcutta case quoted, I would simply observe that the opinion there recorded, which was followed in another case, *Brojendur Roy* v. *Jugurnáth Roy* (*d*), does not appear to meet with the concurrence of some of the other judges, as in a decision reported in 2 Bengal Law Reports A. J. Civil 82 (*e*) it is mentioned by Jackson, J., that if it were necessary to decide the question, it would have to be referred to a Full Bench, the decision in the first volume of the Weekly Reporter not meeting with the approval of himself and his colleague.

The observations of the learned Chief Justice of this Court above alluded to are as follows:—"It is not now necessary to determine what is the proper course to be pursued by the purchaser in order to recover back the purchase-money. It may be that, under section 258 of the Civil Procedure Code, in a properly constituted suit, the Court ought to direct the money to be restored. I give no opinion upon that."—p. 93.

Sargent, J.'s observations, at page 96, are these: "A question must arise between the execution creditor and the purchaser. There must be an equity on the part of the latter to recover back his purchase-money, as the consideration for it has failed. This depends on the general principles of equity, and it also appears that it is so under Sec. 258 of the Code of Civil Procedure. That section, in my opinion, being general in its terms, applies to all cases in which a sale is set aside, and not merely when it is set aside by reason of some irregularity in the proceedings; and so it would appear to have been decided by the High Court in Calcutta."

(*b*) 1 Calc. W. Rep. Civ. R. 55. (*c*) 5 Bom. H. C. Rep. O. C. J. 93, 96.
(*d*) 6 Calc. W. Rep. Civ. R. 147. (*e*) Rajib Lochan v. Bimalamani Dasi.

1869.

KRISHNA'PA, valad SANTU' v. PANCHA'PA' valad GURPADA'PA', *et al.*

When the case of *Dhóndú* v. *Rámji* was argued before the then Mr. Justice Tucker and myself no mention was made of any decision of the Calcutta High Court, but I now find, in addition to the case above alluded to, a similar case reported in 6 Calc. Weekly Reporter 147 (*e*). In my judgment I depended a good deal on the English rulings that no warranty was given at a sheriff's sale, and I am still inclined to that opinion. But I prefer now to deal with the question entirely on the provisions of the Civil Procedure Code; and with all deference to the decisions of the Calcutta High Court, and to the opinion expressed by my learned brother Sargent, I consider that the provisions of Sec. 258 should not be interpreted in the very broad manner which has been suggested.

A Full Bench of this High Court in the case of *Reg.* v. *Krishna Paráshrám* (*g*) applied the principle laid down in *Marriage* v. *The Eastern Counties Railway Company* (*h*), viz., that the headings of the various divisions of sections may be referred to as a guide to determine the meaning of a section in the Criminal Procedure Code. On the same principle, I consider that the heading "Of Sales in execution of decrees" shows that Secs. 248 to 272 are to be taken as the portion of the Code especially relating to that subject, and that the law relating to such sales is contained therein. I will review these sections: sections 248 and 249 apply to all sales; they state by whom the sales are to be conducted, and what notification is to be issued to the public, as also the time of sale; sections 250 to 252 apply to sales of moveable property only; section 250 permits process for attachment and sale of such property to be issued simultaneously; section 251 provides for the mode of payment for such, and section 252 provides that no irregularity shall vitiate the sale of such property, but leaves any person so injured to recover damages by a separate suit.

Sections 253 to 260 refer to sales of immoveable property; and to these it is now necessary to pay very careful atten-

(*f*) Brojender Roy v. Jugurnáth Roy. (*g*) 5 Bom. H. C. Rep. Cr. Ca. 69.
(*h*) 9 Ho. Lo. Ca. 32.

tion. After stating the amount of deposit, and providing for the payment of the balance and the consequences of default, the 256th section provides for the confirmation of the sale by the Court. It contains the following proviso :—

"At anytime within thirty days from the date of the sale, application may be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity."

The 257th section provides an appeal against an orde disallowing an objection.

Then follows the 258th section, which runs thus:—

"Whenever a sale of immoveable property is set aside, th purchaser shall be entitled to receive back his purchase money, with or without interest, in such manner as it ma appear proper to the Court to direct in each instance."

The 259th section provides for a certificate bein granted to the purchaser on the sale being made absolute.

Now, it appears to me that the natural application of th 258th section is to the two preceding sections, and that afte the words "whenever a sale of immoveable property is se aside" we must understand the words "in the manner abov mentioned," *i.e.*, on the ground of any material irregularit in conducting or publishing the sale. I cannot see that an wider scope should be given them. But it is argued that th effect of a suit brought under section 246, if the plaintiff b successful, is really to set aside the Court's sale, and therefor in such a case section 258 is applicable; and the purchase who has been deprived of the property which was put int his possession under the sale, should have the purchase money returned with or without interest. Now these ar nearly the facts of the present case. Krishnáppá was th purchaser at a Court's auction of the right, title, and interes of one Hanmantá in a house attached and sold as tha person's property. The sale was made absolute, the certifi cate granted, and Krishnáppá was put in possession. On

1869.

KRISHNA'PA' valad SANTU' v. PANCHA'PA' valad GURPADA'PA', *et al.*

Bábá, instituted a suit against Krishnáppá, Hanmantá, and, the judgment-creditor at whose suit the sale took place, and established his claim to the house, from which Krishnáppá was then ejected. Now, can it be said that the decree against Krishnáppá sets aside the sale at which he purchased? Considering the various provisions of the Civil Procedure Code, and its distributions into parts and subjects, and its great fulness of directions, I cannot arrive at the conclusion that Bábá's decree can be considered in the light of an order setting aside the sale. What did Krishnáppá purchase at the sale? The right, title, and interest of Hanmantá in the house, and nothing more. There was no warranty that Hanmantá had any right, title, and interest in it, and, therefore, he bought at his own risk; and if, in a subsequent suit, it was decided that Hanmantá's right, title, and interest were *nil*, and that the entire property belonged to Bábá, I cannot consider that that decree in any way affected the sale to Krishnáppá of such right, title, and interest, which still holds good, although what he bought now proves to be worthless. Had the Legislature intended the effect of section 258 to have the wide meaning which the Calcutta High Court has given, and my brother Sargent would give to it, I feel sure that the clear intimation of such intention would have been found in words in the Code. But such not being the case, I, for the reasons above recorded, adhere to the decision at which I arrived in *Dhóndú* v. *Rámjí*, and I would therefore confirm the Lower Appellate Court's decree, with costs.

LLOYD, J.:—The sale not having been set aside under the provisions of the Civil Procedure Code, I fully concur with my brother Gibbs that Section 258 does not apply in this case; and as no authority has been pointed out which would, under the circumstances, justify our directing a refund of the purchase-money from the parties at whose instance the property was sold, the decree of the Senior Assistant Judge must be upheld.

Decree confirmed.

Note.—See the judgment in Sowdamini Chowdian v. Krishna Kishon (4 Beng. Law Rep. F. B. 11), which is to the same effect as the above.—ED.

Special Appeal No. 342 *of* 1869.

1869.
Sept 30.

GORDHANDA'S GIRDHARBHA'I .....*Appellant.*
PRA'NKOR, Widow of DA'MODHAR, *et al* ...*Respondents.*

Preemption amongst Hindús—Custom of Gujarát.

The existence of a local custom as to the right of preemption among the Hindús of Gujarát recognized.

Such a custom, where it exists, is regulated by the rules and restrictions of the Muhammadan law.

THIS was a Special Appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 80 of 1869, confirming the decree of the Ṣadr Amín of Broach, in Original Suit No. 480 of 1868.

The plaintiff instituted his suit to establish his right of preemption in respect of a house sold by his neighbour, the first defendant, to the defendant No. 2; to obtain possession of the same on payment of Rs. 399; and also to obtain a decree declaring the deed of sale executed between the two defendants to be null and void.

The defendants pleaded, *inter alia*, that the suit was barred by the usage of the country; that, they being Hindús, the rules of Muhammadan law did not apply to them; and that, as a matter of fact, an offer had been made to the plaintiff and declined by him.

The Ṣadr Amín decreed against the plaintiff, on the ground that he had himself neglected to secure his right of preemption.

The Judge found that the evidence of the witnesses produced by the plaintiff did not amount to proof of the custom set up by him; but, recognizing such a custom for the sake of argument, he was of opinion that the plaintiff had failed to comply with the requirements of the Muhammadan law preparatory to his demand for the enforcement of his claim.

The Special Appeal was argued before GIBBS and MELVILL, JJ.

1869.

GORDHANDA'S GIRDHARBHA'I v. PRA'NKOR, Widow of DA'MODHAR, *et al.*

Nánábhái Haridás and *Shantárám Náráyaṇ* for the appellant.

Dhirájlal Mathurádás and *Girdharlál Dayáldás* for the respondents.

PER CURIAM:—We find that the District Judge was in error in holding that no such local custom as the right of preemption exists among Hindús in Gujarát. There have been many cases disposed of in the Ṣurát and Broach Adálats, and upheld by the late Ṣadr Diváṇí Adálat, in which the custom is admitted. *Narun Nursuee* v. *Premchund Wullubh* (*a*) is a case in point. The custom exists also in the Bengal Presidency (See. 7 Cal. S. D. A. Rep. 129, and many other cases quoted in Morley's Digest vol. I. p. 537, para. 11). There is no doubt that the custom in Gujerat is the Muhammadan right of preemption, or *hak shaſi*, and therefore that in deciding such a suit as the present it is to the particulars of that law we must look for guidance. In the present case the District Judge, adopting the decree of the Court of first instance, found that the original plaintiff not only did not comply with the requirements of that law, but he also held that he refused the purchase when offered. We must therefore confirm the decrees of the Lower Courts, throwing out the plaintiff's claim with costs.

Decree confirmed.

(*a*) 9 Harrington, p. 591.

Special Appeal No. 305 *of* 1869. 1869. Sept 13.

RA'NU valad AVA'JI MA'LI .....*Appellant.*
RAMA'BA'I KOM MAHA'DU M'ALI .....*Respondent.*

Mortgage—Rázinámá—Equity of redemption.

A mortgage deed of *gatkuli* land contained a clause by which the mortgagor agreed, at the expiration of the period for which the mortgage was made, to give a *rázinámá* of the mortgaged land.

In accordance with this stipulation, the mortgagor gave in a *rázinámá* to Government, by which he gave up all claim to the land; which was then granted to the mortgagee.

Held, that the equity of redemption of the mortgagor was thereby extinguished.

The Government need not be made a party to a suit of this nature unless the interests of Government are affected.

THIS was a Special Appeal from the decision of C. B. Izon, Senior Assistant Judge at Solápúr, in Appeal Suit No. 240 of 1867, amending the decree of the Munsif of Mareh.

The suit was brought by Rámábái to redeem three fields (Survey Nos. 318, 320, 213) at Khem, which had been mortgaged to the defendant on different occasions in 1854.

The defendant, Ráṇú, answered that, with respect to Nos. 318 and 320, the mortgagor's right to redeem was lost and his claim barred; and with respect to No. 213, that one year after the mortgage the plaintiff entered into an agreement with the defendant, in accordance with which he gave a *rázinámá* of the field, and that the defendant held the land from Government.

The *rázinámá* was to the following effect:—

"To the Government of the Honorable Company Bahadur: The *rázinámá* of Ramábái Kom Mahádú Malí Devkár, inhabitant of the village of Waije, for the Fasli year 1264.

"At this village three numbers or holdings stand against my name (Nos. 213, 318, and 320). These numbers I cannot undertake to cultivate for the year 1865, for I have not the requisite number of plough oxen; therefore, by reason of my inability, I have given up these fields of my own accord. Government may let them to any one else to cultivate. I have no manner of proprietor's claim left on these numbers. This resignation was given on the 25th April 1855."

1869.

RA NU valad AVA'JI MA'LI v. RAMA'BAI' KOM MAHA DU MA'LI.

The mortgage deed contained the following clause :—"I (defendant) shall give a *rázinámá* of these fields next Fasli year, and you may have a transfer of the lands to your name, and you may hold them from Government; I shall set up no claim to the said fields."

The Munsif of March decreed the redemption of fields Nos. 318 and 320, which were *Mirasi* fields on payment of principal and interest, holding, that although the term of the mortgage was over, the title to redeem was not lost. With respect to No. 213, he threw out the plaintiff's claim, holding that the equity of redemption had been extinguished by reason of the subsequent *rázinámá*, by which he abandoned the land absolutely.

The plaintiff appealed from this decision to the Assistant Judge at Solápúr, on the ground that the *rázinámá* could not have the effect of extinguishing his equity of redemption.

The Assistant Judge held that plaintiff's right to redeem No. 213 was not lost by reason of the *rázinámá*. He said that all the three fields were transferred to the defendant as security for the debt; that no evidence of sale was adduced; the *rázinámá* proved nothing, as it referred in the same terms to all the fields. *Rázinámás*, he said, were authorities to the revenue officers to transfer fields from one person's name to another. The Assistant Judge accordingly amended the decree of the Munsif, by allowing the plaintiff to recover all the fields, on payment of principal and interest due upon the mortgage.

The special appeal was argued before WARDEN and LLOYD, JJ.

Gopináth Sádáshivá for the appellant:—The *rázinámá* is an absolute abandonment of the right of the plaintiff to the land mortgaged. This is clear from its terms. "He had no manner of claim over the fields; the Sirkar might let the holding to any person it chose." The *rázinámá* was given, moreover, in pursuance of an agreement in the mortgage deed in which it was stipulated "that if within a year's time the

debt was not paid off, the mortgagor would give a *rázinámá* of the fields, and then the mortgagee might take the lands from Government, and transfer them to his own account, the mortgagor agreeing to make no manner of claim upon the fields or the trees that grew on it." Plaintiff's interest in the land was completely at an end when the *rázinámá* was given to the Government, and no equity of redemption could remain in him after abandonment.

Bhairavnáth Mangesh for the respondent:—The plaintiff claims as *mirásdár*, and in Special Appeal No. 277 of 1868 it was held that a *mirásdár*, though he gives a *rázinámá*, has a right to recover his land within the time allowed by law, unless he gives up his *mirás* rights over it. The abandonment in this case is only temporary, for the purpose of giving complete effect to the mortgage security, and is not intended to be operative beyond the mortgage term. The *rázinámá* is only an authority to transfer the holding from one name to another. A mortgagor's equity of redemption can only be extinguished in one of three ways: I., by a decree of foreclosure; or, II., by limitation; or, III., by a *bonâ fide* sale or release of the right for valuable consideration (Addision on Contracts, p. 257). There has been no foreclosure decree; the claim is not barred by lapse of time; and there has been no sale or release of the right to redeem for a fresh and valuable consideration. The *rázinámá* is without consideration, and cannot therefore operate as a release. In Special Appeal 75 of 1868 there was a mortgage of land for a term of years. In a subsequent deed of sale between the same parties relating to some other land, allusion was made to the land first mortgaged, to the effect that the first land has been already sold to you. When the mortgagor sued for redemption it was held that this allusion to the mortgage transaction in the subsequent deed did not take away the morgagor's right to redeem, as no consideration was shown for the conversion of the mortgage into a sale. The *rázinámá* in this case was equally without any consideration. Lastly, in a leading case upon the construction of

1869.

RA'NU valad AVA'JI MA'LI v. RAMA'BA'I KOM MAHA'DU MA'LI.

rázinámás, No. 512 of 1863 (*b*), it was held that the Collector should be made a party in a suit founded on the abandonment of land by *rázinámás* to Government.

Gopináth Sádáhivá in reply:—The land is not *mirás* land. It is expressly stated that it is *gatkuli* land, in contrast with the two other fields, which are *mirás*. The precedents therefore do not apply. The *rázinámá* was given owing to the poverty of the plaintiff, and his inability to pay the assessment. This was a sufficient consideration for the abandonment.

PER CURIAM:—We think the plaintiff's abandonment of the land was final, and without reservation. There is always a distinction between *rázinámás* with express words of unreserved abandonment and *rázinámás* without such words. The former are total abandonments of all the interest of the holder in the land. The land is shown to be *gatkuli* and not *mirás*, the precedents therefore do not apply. Government have no interest in cases of this sort, which are mere matters between party and party, and do not affect the interest of Government in the land. Government need not be made a party except when the *mirási* or *gatkuli* tenure of the land is a point for determination. We hold that the *rázinámá* is evidence of complete abandonment by the plaintiff of his interest as holder of the land under Government, and accordingly amend the Judge's decree, by throwing out the claim to No. 213.

Decree amended.

(*b*) This case, in which Rávji bin Govind and Bhává bin Devjí were appellants, and Bápú bin Dárkoji was respondent, was a Special Appeal from the decision of W. H. Newnham, Assistant Judge, Ahmednagar, in Appeal Suit No. 157 of 1863, reversing the decree of the Munsif of Násik. The judgment of the Court (Couch, C. J., Newton and Warden, J.J.,) which states the facts, was delivered by COUCH, C.J.:—The appellants, Rávji and Bhává, sued the respondent Bápú, to recover a field, No. 9, in the village of Ochli, alleging that it was their *mirás* land, but four years ago they allowed it to fall waste, and then Bápú occupied it without their leave, and now would not restore it.

Bápú answered that the appellants abandoned the field by *rázinámá*, upon which he had taken up the lands from Government.

The appellants, in reply, alleged that there was a custom in the táluká where the land was situated for occupants to abandon the land without abandoning their *mirás* rights over it, and that they might afterwards resume possession.

1869.

RA'NU valad AVA'JI MA'LI v. RAMA'BAI KOM MAHA'DU MA'LI.

The Munsif found that the custom was admitted by the defendant. He found that the plaintiffs had *mirás* rights in the land, and made a decree in their favour.

Bápú appealed, on the ground that he had taken up the land from Government, and that Rávji and Bhává, having abandoned their rights, had no right to sue.

The Assistant Judge reversed the Munsif's decree on the ground—(1), that the Munsif was mistaken in saying that the *mirás* rights of the appellants were acknowledged by the respondent, and that there was not sufficient evidence to show that the appellants were *mirásdárs*; and, (2), that the *rázinámá* which had been given by the appellants was an abandonment of all their rights to the land unless specified to the contrary.

Against this decree the original plaintiffs appeal, contending that they have by custom a right to resume the land notwithstanding the *rázinámá*, which it is not disputed was given by them.

We think the decision of the case will depend mainly upon the construction to be put upon the instrument by which the appellants professed to abandon their land to Government; and that the question whether a person giving such an instrument can afterwards resume the land, and, if so, upon any and what terms as to paying arrears of assessment, or making compensation to a subsequent occupant, is one in which the Government is interested. Before we can decide upon the effect and operation of the *rázinámá*, and what rights in the land the appellants relinquished by it, and whether they retained the right to resume the possession, it is necessary that it should be determined whether the land is in fact *mirás*, and the appellants are entitled to it as *mirásdárs*. Upon any construction that can be put upon the instrument, their right to resume the possession would appear to depend upon this. The Assistant Judge has found that the appellants have not shown themselves to be *mirásdárs*. This finding is objected to in the grounds of appeal as contrary to the admission of the respondent; but we think the Government is interested in the question whether the appellants are *mirásdárs*. We should not be justified in reversing the finding of the Judge in this matter, and treating the admission of the repondent as sufficient proof of the fact without further inquiry, and we remand this suit to the Court below, to try and determine the issues whether the land claimed is *mirás* land, and whether the appellants were at the time of giving the *rázinámá* entitled thereto as *mirásdárs*.

The *rázinámá* must be construed according to the plain meaning of the language used, having regard to the rights of the party in the land recognized by law; and no ground exists in this case for admitting the evidence of the alleged custom in the táluká to explain it or to contradict it, or vary it by annexing to it a right of resuming possession, which cannot be gathered from its language. The custom admitted by the defendant is for *mirásdárs* to resume land abandoned on account of exhaustion, but in the *rázinámá* the reason for abandoning is stated to be that the parties were too poor to cultivate the land. The Collector must be made a party to the suit, and notice be given to him according to Sec. 73 of Act VIII. of 1859.

1869.
Dec. 6.

Special Appeal No. 371 *of* 1869.

MELGIRA'PPA' bin SOLBA'PPA' TELI' ..... *Appellant.*
SHIVA'PPA' bin ERA'PPA' ..... *Respondent.*

Alienation by Hindú widow—Valid cause—Time-barred debt.

The payment of a time-barred debt of her deceased husband is not a valid cause for the absolute alienation by a Hindú widow of her deceased husband's immoveable estate.

Alienation by a Hindú widow of property inherited from her deceased husband is valid for the period of her own life, though the conveyance may purport to convey a greater interest.

THIS was a Special Appeal from the decision of M. B. Baker, Assistant Judge at Dhárwár, in Appeal Suit No. 81 of 1869, affirming the decree of the Ṣadr Amín of Hubli.

This suit was instituted by Shivápá against Eravá, and Melgirápá, a brother of Eravá's deceased husband, to recover possession of a house and certain other property, which Eravá had made over to him by a deed of sale dated 16th January 1868, and from which he was turned out by force by defendant, Melgirápá.

Eravá put in no reply. The defendant Melgirápá answered that Eravá was his brother's widow; that she left her husband about sixteen years ago, when Kenshetápá, the husband, married a second wife, and as Kenshetappa had no issue by her he adopted his (Melgirappa's) boy, Ramápá, and died about seven or eight years ago; that Ramápá, the adopted son of his deceased brother, was a minor, and that he Melgirápá occupied the house on Ramápá's account. He denied Eravá's title to alienate her husband's property, and plaintiff's possession under the deed of sale.

The Ṣadr Amín of Hubli found that Ramápá's adoption by Kenshetápá was not proved. He held further that the deed of sale was proved, and that the widow, Eravá, and not Melgirápá was in possession of the house. He accordingly decreed for the plaintiff.

The defendant, Melgirápá, appealed to the District Court of Dhárwár, and the Assistant Judge, W. B. Baker, found:

1869.
MELGIRA'PPA' bin SOLBA'PPA' TELI' v. SHIVA'PPA' bin ERA'PPA'.

(1) that the deed of sale was proved to be duly executed and grounded on a *boná fide* transaction; (2ndly) that Eravá, though a childless widow, had power to alienate the husband's estate for the payment of his debts; (3rdly) that the adoption of Ramáppá by Kenshetáppá was not proved; and, lastly, that the possession of the house was with Eravá. He accordingly affirmed the decree of the Sadr Amín.

In recording his finding on the second issue, the Assistant Judge made the following observations:—

"The deed of sale purports to have been executed in satisfaction of two decrees which Shiváppá had formerly obtained against Eravá. One was obtained in 1861 on account of a bond of the husband, and the other was for a debt contracted by Eravá herself in 1867. Though there is nothing to show that any proceedings for execution of the decree of 1861 had been taken, and the decree is barred by limitation, yet *mala fides* should not be presumed, because the law of limitation does not extinguish the right, but only bars the remedy. Melgiráppá, moreover, is, by his own admission, a separated brother, and, though cognizant of the sale and the attachment in execution of the decree, stood by, and took no steps to declare his proprietory title." For these reasons the Assistant Judge held that Eravá could convey a valid title to the purchaser.

The defendant, Melgiráppá, appealed from this decision, and the appeal came on for hearing before WARDEN and MELVILL, JJ.

Shántárám Náráyan for the appellant:—The decree in this case will operate beyond the lifetime of Eravá to the prejudice of the reversioners. Eravá, as a childless widow, can only convey a good title for her life, unless it is shown that she was justified by any legal necessity. In this case the alienation was made for the satisfaction of two decrees, one for a debt of the widow herself, and the other a time-barred decree for a debt due by the husband. It is not clearly shown for what purpose the first debt was contracted. There was thus no occasion to justify the alienation by the

1869.

MELGIRA'PPA' bin SOLBA'PPA' TELI' v. SHIVA'PPA' bin ERA'PPA'.

widow, and the sale must be considered to be in the nature of waste against the interests of the reversioners.

Fakíráppá for the respondent.

PER CURIAM:—The Assistant Judge has found that the alienation by Eravá was on account of a time-barred debt of her deceased husband, and a debt of her own. The former debt cannot be considered as a sufficient cause of alienation to the prejudice of her husband's heirs. As to the latter debt the Judge has not found whether it was incurred for any such purpose as would justify alienation by a childless widow. If the validity of Eravá's alienation were at issue it would have been necessary to send down issues. But whatever be the circumstances, Eravá had a right to alienate for her own life only, and therefore the plaintiff is entitled to hold present possession, which is all he claims. The Court below should not have travelled beyond this simple issue. The decree must be amended, and possession awarded to the plaintiff, but without any determination as to what will be the rights of the parties after Eravá's death.

Decree amended with costs on defendant throughout.

CROWN CASES

DECIDED IN THE

ORIGINAL AND APPELLATE JURISDICTIONS

OF THE

HIGH COURT OF BOMBAY.

REG. v. JIVANJI LIMJI.

1869.
Feb. 11.

Bond to keep the peace—Credible Information—Report by Sub-Magistrate—Legal Evidence—Crim. Proc. Code, Secs. 282, 288, *and* 307.

A statement by a private person not upon oath or solemn affirmation is not credible information, upon which alone a Magistrate should issue a summons under Sec. 282 of the Code of Criminal Procedure.

Semble—A report by a Subordinate Magistrate of facts within his knowledge would be credible information, upon which such summons might issue, but would not be sufficient ground for a final adjudication under Sec. 288.

In order to warrant an adjudication under Sec. 288, there should be a judicial investigation, and the order should be passed upon legal evidence duly taken and recorded.

IN this case the accused was required to give security, under Sec. 288 of the Code of Criminal Procedure, by T. C. Hope, Magistrate of the District of Súrat, who made the following order:—

"Jivanji Limji appears in answer to a summons, issued under Sec. 282 of the Criminal Procedure Code, calling on him to show cause why he should not be required to enter into a bond to keep the peace towards A'darji Bhikáji and others connected with him, residing in Hánsoṭ.

"Read and recorded a list of nine magisterial and eight revenue cases, from which it appears that Jivanji in two instances brought, or was concerned in, complaints against A'darji, of various kinds, which were for the most part vexatious and frivolous, and that in other instances he was rightly prosecuted by A'darji for acts which were, under the circumstances, likely to produce a breach of the peace.

1869.
REG.
v.
JIVANJI LIMJI.

"Jivanji Limji states: 'I have been taking liquor contracts in the Hánsoṭ district for the last two years, so I am on bad terms with A'darji Bhikáji, who used formerly to combine with others in taking the contracts below their value, and who wants me to go shares with him. I have only complained twice for assault, and my complaints were dismissed after four months' delay. He has this year got five shops, and I will not go shares with him. Tuljárám Viṭhaldás and two others can testify to this. I have never been punished in my life, and can offer evidence as to my character.'

"The Court, after carefully considering the cases recorded, and the credible information received from the Mámlatdár, Mahálkari, and others, and being for some time personally acquainted with both parties, is of opinion that Jivanji Limji is habitually the aggressor, and does, or causes to be done, various acts in the nature of persecution that may probably cause a breach of the peace. The Court is satisfied that it is necessary, therefore, to take from Jivanji a bond to keep the peace for Rs. 300, with one surety of equal amount, or two of Rs. 150 each; and the Court orders that Jivánji Limji enter into a bond accordingly for the period of one year."

The Session Judge, C. G. Kemball, referred the case for the orders of the High Court, under Sec. 434 of the Criminal Procedure Code, with the following remarks:—

"These proceedings consist of a petition made by A'darji Bhikáji, but unsupported by solemn affirmation, containing a series of general charges against one Jivanji Limji, his friends and servants, for interfering with his management of a liquor contract, and against some of the sub-magisterial officers for not giving him redress; also of a detailed statement of various cross-complaints between the two parties and their dependants, a summons to Jivanji Limji, dated 26th November, Jivanji's answer on appearing in compliance with the summons on the same date, and the Mahálkari's report as to the fitness of one Jamásji to be a surety.

1869.
REG.
v.
JIVANJI
LIMJI.

"Upon this record the Magistrate, remarking 'The Court, after carefully considering the cases recorded, and the credible information from the Mámlatdárs and Mahálkaris and others, and being for some time personally acquainted with both parties, is of opinion,' &c., took a bond from Jivanji with one surety to keep the peace for one year. But as there is no record whatever of the 'credible information' on which the Magistrate proceeded against Jivanji, and the Magistrate had no power to act upon his own bare personal knowledge, whatever that may have been, I consider that the order passed was contrary to law, and, therefore, determine to refer the proceedings for the orders of the High Court."

"The Government Pleader, who was instructed to appear in support of the Magistrate's order, has argued that no evidence is necessary, under Secs. 282 and 288, the order to furnish security being a matter purely for the discretion of the Magistrate, that is to say, that the Magistrate can act upon any kind of information, formal or otherwise, that he thinks credible; but credible information appears to mean legal proof, and Sec. 307 provides for the taking of such evidence. To summon a man, and to order him to find security, upon information which it is manifestly impossible for him to meet, appears to me directly contrary to the spirit of the law."

The case was heard before TUCKER and WARDEN, JJ.

Dhirajlál Mathurádás, (Government Pleader,) appeared in support of the order.

TUCKER, J.:—This is a reference made by the Session Judge of Súrat under Sec. 434 of the Code of Criminal Procedure. He transmits the record of the proceedings of the District Magistrate of Súrat in the case of one Jivanji Limji, who was ordered, on the 26th of November 1868, to enter into a bond for a sum of Rs. 300 to keep the peace for the term of one year, with one surety for an equal amount, or two sureties for sums of Rs. 150 each. The order appears to have been made under Sec. 288 of the Criminal Procedure Code, and the Session Judge is of opinion that it

1869.
REG.
v.
JIVANJI
LIMJI.

should be set aside, on the ground of its being contrary to law, in consequence of its having been made without any legal evidence having been taken and recorded.

On examining the Magistrate's proceedings, it would seem that he in the first instance issued a summons under Sec. 282, on a simple petition of complaint made by a Pársi named A'darji Bhikáji, unsupported by any declaration upon oath, and that on the appearance of the accused, who in no way admitted the allegations against him, the Magistrate made the final order without taking or recording any evidence, either against him or in his favour.

The grounds for this order are stated by the Magistrate as follows :—

(1) The perusal of certain cases, revenue and magisterial, in which the accused or his friends were complainants, or in which the accused had been prosecuted by the petitioner, A'darji. The Magistrate has given a list of these cases, but he has recorded none of them.

(2) Credible information stated to have been received by the Magistrate from certain Mámlatdárs, a Mahálkari, and others. None of these informants are named or otherwise designated, nor have any reports from, or statements made by, them been recorded, nor has any substance of the information which they supplied been given.

(3) The Magistrate's personal acquaintance for some time with the accused and the person who complained against him.

Mr. Dhirajlál, the Government Pleader, has appeared in support of the Magistrate's order, and has contended that a District Magistrate may make an order, under Sec. 288, upon any information which he may deem credible, and that it is not necessary that this information should be upon oath or solemn affirmation, or that it should be taken down in writing and recorded; that it is sufficient, if the Magistrate feels satisfied, from such information as he may possess, or from circumstances within his knowledge, that it is necessary for the preservation of the peace that the person before

him should be bound over to keep the peace, to authorise him to act under Sec. 288; and that no further record was requisite than that the Magistrate was so satisfied. In the present instance the Magistrate has done everything that he was bound by law to do. Mr. Dhirajlál cited in support of his argument a ruling of the A'grá Ṣadr Court in 1862, of which a note is given by Mr. Prinsep in his edition of the Code of Criminal Procedure, under Sec. 282, and a decision of the Madras High Court *Ex parte Nillikel Edatthil* (*a*).

We have not had access to the report of the decision of the A'grá Ṣadr Court which has been referred to. If Mr. Prinsep's note of the ruling be correct, we are compelled to state that we dissent from the opinion therein expressed. We are unable to hold that a statement by an irresponsible person, unsupported by an oath or solemn affirmation, can be lawfully treated by a Magistrate as credible information, or that a Magistrate would be authorised to issue a summons under Sec. 282 on such a statement alone. We concur in the view of the Madras High Court, that a report by a Subordinate Magistrate of facts within his knowledge would amount to credible information, and, if duly recorded, would form a ground for a Magistrate's issuing the preliminary summons, as directed in Sec. 282; but we cannot go any further, or hold that a report of this description would, unsupported by other evidence, form a sufficient ground for the final adjudication referred to in Sec. 288. From this section and the two sections immediately preceding it, we gather that it was the intention of the Legislature that, on the appearance of a person summoned in accordance with Sec. 282, there should be a formal judicial inquiry, and adjudication that the said person was likely to commit a breach of the peace, or do an act which might probably occasion a breach of the peace; and we cannot suppose, in the absence of an express direction of the law on this particular point, that it was intended that in such an investigation the ordinary judicial procedure was to be departed from, and that the final

(*a*) 2 Mad. H. C. Rep. 240.

1869. REG. v. JIVANJI LIMJI.

award might be made otherwise than upon legal evidence duly recorded. It is enacted in Sec. 288 that if the Magistrate shall be satisfied that it is necessary for the preservation of the peace to take a bond from the person he has summoned, with or without security, he may make the order contemplated by that section; but it appears to us that it would be a most erroneous interpretation of this section to hold that a Magistrate might be satisfied, and could inflict what amounts to a severe penalty, in the absence of any legal evidence regularly recorded. Sec. 307 appears to us to be a clear indication that the Legislature had no such design. On this point we concur in the judgment of the Calcutta High Court in the case of *Narsingh Narayen* (*b*), a decision which has already been followed by another Division Bench of this Court in the case of *Reg.* v *Dalpatrám Pemábhá*, decided on the 17th of December 1868 (*c*).

In the present case, as there has been no legal evidence duly recorded as a foundation for the Magistrate's decision, we hold his proceedings to have been illegal, and we reverse his order, and direct that the bonds taken from the accused and his sureties be cancelled, or that the accused if he be in custody under the order, be discharged.

WARDEN, J., concurred.

(*b*) 10 Calc. W. Rep., Cr. R. 1. (*c*) 5 Bom. H. C. Rep., Cr. Ca. 105.

Order reversed.

1869. Feb. 11.

REG. v. MEHERVA'NJI BEJANJI.

Cheating—Criminal Trespass—Unlawful Entry—Ind. Pen. Code, Secs. 415 *and* 441.

Where the accused secretly entered an Exhibition building without having purchased a ticket, and was there apprehended:

It was held that such act did not amount to the offence of cheating, under Sec. 415 of the Penal Code.

Such entry, when unaccompanied by any of the intents specified in Sec. 441 of the Penal Code, does not amount to criminal trespass or any other criminal offence.

THE accused, under Sec. 417 of the Penal Code, was convicted by Umedrám Ranchoddás, Magistrate F. P. at

Broach, "of cheating, in having entered the Broach Exhibition without having purchased a ticket," and was sentenced to rigorous imprisonment for one month.

The Session Judge, C. G. Kemball, referred the case for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, with the following remarks :—

"It appears that as the prisoner was leaving the Broach Exhibition room his ticket was demanded, and on his stating that he had lost it he was arrested and taken before the Magistrate, who, upon receiving proof that no ticket such as the prisoner said he had bought was in the list as having been issued to him, convicted the prisoner of cheating, under Sec. 417 of the Indian Penal Code, and sentenced him to one month's rigorous imprisonment. At the most the evidence shows that, whereas admission to the Exhibition could only be obtained with a ticket, the prisoner was found inside without one; and supposing that the prisoner never purchased a ticket at all, it still appears to this court that he, by his presence in the Exhibition, did not commit the offence of cheating, or any other offence against the law. The High Court have held that travelling in a railway carriage without a ticket is not cheating: *Reg.* v. *Dayábhái Rájárám* (*a*); and this appears to me an analogous case. The term of imprisonment will very shortly expire, but, as the sentence was, in my opinion, illegal, no criminal offence having been proved, it becomes my duty to refer the proceedings for the orders of the High Court."

The case was heard before TUCKER and WARDEN, JJ.

The accused was not represented.

Dhirajlál Mathurádás, in support of the conviction :—The accused is clearly guilty of some offence—if not of cheating, then of criminal trespass. [TUCKER, J. :—To constitute the offence of cheating there must be some person who is deceived, and who is induced to do or omit to do something that he otherwise would not do or omit. If the accused had said to the doorkeeper that he had a ticket, and had thus

(*a*) 1 Bom. H. C. Rep. 140.

1869.

REG. v. MEHERVA'NJI BEJANJI.

obtained access to the building, that might be cheating; but if he slipped into the building unobserved, that apparently would not.] Then it amounts to criminal trespass. [TUCKER, J.:—The accused does not seem to have entered the building with any such intention as is required for a conviction under Sec. 441 of the Penal Code.]

Vishvanáth Náráyan Mandlik, amicus curiæ, referred to the case of Kalinauth Nag Chowdhry. (*b*)

TUCKER, J.:—The act which the accused is proved to have committed, namely, entry of the Exhibition building without a ticket, was undoubtedly of a fraudulent character, but it does not seem to come within the definition of any offence declared penal by the Indian Penal Code or any other law. It does not come within the definition of cheating, as given in Sec. 415, as it does not appear that the accused, by deceiving any person, intentionally induced the person so deceived to do or omit to do anything which he would not have done or omitted to do if he had not been so deceived; nor does it amount to criminal trespass, as it cannot be said that the accused entered upon any property with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property. The accused might have been proceeded against by the committee of the Exhibition in the Civil Courts for a trespass, and he might have been compelled to pay damages; but we have been unable to discover any law under which he could be punished criminally for this act. We must, therefore, reverse the conviction and sentence as illegal, and direct the discharge of the accused.

WARDEN, J., concurred.

Conviction and sentence reversed.

(*b*) 9 Calc. W. Rep. Cr. R. 1.

REG. v. KHA'TA'BA'I, wife of Shek Ismáel.

1869. March 4.

Muhammadan Law—Married Woman—Theft of Husband's Property.

A Muhammadan married woman may be convicted of theft, or abetment of theft, in respect of the property of her husband.

THE accused was convicted by Major C. E. Naylor, Cantonment Magistrate at Belgám, of theft, "in having dishonestly taken from the possession of her husband, Shek Ismáel, certain property, consisting of wearing apparel, ornaments, and household articles, of the value of Rs. 175 or thereabouts," and sentenced, under Sec. 379 of the Indian Penal Code, to undergo rigorous imprisonment for nine months.

The case was referred by the Session Judge, C. F. H. Shaw, for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, he being of opinion that a wife in law was so identified with her husband that she could not be convicted of theft of his property.

PER CURIAM (TUCKER and GIBBS, JJ.):—The Court sees no reason to interfere. The act admitted by the accused woman amounts to abetment of theft, and, under Sec. 114 of the Indian Penal Code, she may be deemed to have committed theft. The female in question was a Muhammadan, and consequently there was not between her and her husband the same union of interest which exists between an English husband and wife (*vide* Baillie's Digest of the Muhammadan Law, Introduction xxiv., and p. 145); and among the list of the articles removed with the abetment of the wife there are some which under that law would be recognised as the exclusive property of the husband.

Proceedings returned.

1869.
March 24.

REG. v. SHEK MIYA' valad DA'UD.

Trial by Jury—Defective Summing up—New Trial.

Held (*Warden, J., dissentiente*), that the omission of the Session Judge to tell the jury that the statement of one prisoner is not evidence against his fellow-prisoner is a material error, and one fatal to the trial, notwithstanding that the Session Judge dealt with the evidence against each of the prisoners separately.

THE appellant was, with another prisoner, tried by a jury for the offence of attempt to murder, and abetment thereof, before the Session Judge of Puṇá. The jury found the appellant not guilty of the former, and guilty of the latter charge, and the Session Judge sentenced him to transportation for life. His fellow-prisoner was found guilty of the offence of attempt to murder, and was also sentenced to transportation for life. The latter did not appeal; the appeal of the former was argued on the 17th of March 1869, before TUCKER and WARDEN, JJ.

The Honorable L. H. Bayley (Advocate General) for the appellant.

Dhirajlál Mathurádás, (Government Prosecutor) for the prosecution.—

Cur. adv. vult.

On the 24th of March the following judgments were delivered:—

TUCKER, J.:—I am of opinion that there has been a grave error or defect in the summing up of the Session Judge at this trial, by which the accused Shek Miyá valad Shek Dáud has been materially prejudiced, and that consequently considerations of justice require that the verdict of the jury so far as it concerns him should be set aside, and a new trial ordered.

The accused has been tried with another man, who in the course of the trial made a statement in which he acknowledged his presence at the scene of the crime, and declared that his companion in the dock had been the instigator of, and principal actor in, the commission of the offence for which they had been both arraigned.

The Session Judge, in summing up, treated the case of each accused as distinct, and in referring to the second accused, Shek Miyá, made no mention of the statement of the other accused which had been made in the presence of the jury, as he should have done, to exclude that statement altogether from their consideration in forming their opinion of the guilt or innocence of Shek Miyá.

There can be no question that the Session Judge should have done this, as nothing was more probable than that persons unacquainted with the rule of law on this subject would allow the statement of one accused incriminating his fellow-prisoner to operate in their minds prejudicially to the other. My brother Warden is of opinion that, as the case against each prisoner was placed before the jury separately, and as no mention was made of the statement of the first prisoner in the summing up of the evidence against the other, the omission of the Judge cannot properly be considered to be an error which prejudiced the accused whose appeal is now before us.

Reluctant as I am to interfere with the verdict of a jury, I am unable to concur in this view. The case is a very peculiar one, and the nature of the circumstantial evidence against Shek Miyá rendered it of the utmost importance that the jury should have been directed to reject entirely from their consideration the statement which had been made by the other prisoner. It appears to me in the highest degree probable that the jury did allow this statement to have weight in forming their judgment of the guilt of Shek Miyá, and it seems to me that the omission of the Judge to notice and enforce the remark of the advocate for the defence, that the statement of prisoner No. 1 was not evidence against prisoner No. 2, might well have misled the jury into supposing that it was not necessary for them to attend to that observation.

In the case of *The Queen* v. *Scaife, Smith, and Rooke* (*a*), which has been cited by the Advocate General, where the deposition of an absent witness was admissible against one

(*a*) 17 Ad & E 238

1869.

REG. v. SHEK MIYA'.

of several prisoners, who had been found to have procured the absence of the witness, and was not admissible against the others, who were not implicated in keeping the witness out of the way, and the Judge at the trial, admitting the deposition, left it generally to the jury, and did not point out that its contents could be treated as evidence against one prisoner only, and not against the others, and the latter were convicted, it was held unanimously by the Judges of the Court of Queen's Bench that the omission was a sufficient ground for a new trial, and the verdict was set aside, and a new trial granted.

In the judgment of the learned Chief Justice at Calcutta in the case of *Elahee Buksh, appellant* (*b*), he has pointed out as follows :—

"Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favour. By such a summing up, the Judge would not comply with the requirement of the Code of Criminal Procedure, and a verdict found upon such a summing up ought, I think, to be set aside, if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be 'a practice which deserves all the reverence of law,' would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and found by a jury upon such a summing up." (*c*)

It appears to me that the error committed by the Session Judge in this case is of a graver character than the last of the omissions to which Sir Barnes Peacock has referred, and which he considered would have formed a proper ground for setting aside the verdict of a jury; and that the most disastrous consequences would result in the administration

(*b*) 5 Calc. W. Rep., Cr. R. 80. (*c*) Ibid p. 88

1869.

REG. v. SHEK MIYA'.

of justice if such an error were not treated as a fatal flaw in a case like the present one.

The order of the Court will, therefore, be, that the conviction and sentence in the case of the accused Shek Miyá valad Shek Dáud be set aside, and that the said accused be re-tried before a new jury on the previous commitment.

WARDEN, J. :—In accordance with Sec. 36 of the Letters Patent, this case has to be decided by the opinion of the Senior Judge; I must, therefore, place on record that I dissent from my brother Tucker.

The ground on which the learned counsel for the accused has applied to us to set aside the verdict of the jury is that the Session Judge, in his summing up, omitted to warn the jury against attaching any weight to the statement of the accused No. 1 when considering the evidence against the accused No. 2.

There are two or three remarks in the summing up of the Session Judge which have been objected to by the counsel for the accused No. 2 ; but as they are not, in my opinion, of any importance, and as my brother Tucker holds the same view with regard to them, I will confine myself to noticing the above omission, on which the learned counsel has laid so much stress.

Had the Session Judge, in his summing up, blended closely together the evidence against the two accused, I should, without any hesitation, have concurred with my brother Tucker in setting aside the verdict of the jury, and ordering a new trial; but the Session Judge has, in his summing up, dealt so distinctly with the evidence against each of the accused, has kept one so separate from the other, that I feel thoroughly convinced that the jury, in weighing the evidence against the accused No. 2, have not allowed the statement of the accused No. 1 to bias them; the accused No. 2 could not, therefore, have been, in any way, prejudiced by the Session Judge omitting to tell them that the statement of one accused ought never to be allowed to tell against the other accused. I am, therefore, very strongly opposed to any interference on our part, and consider that the verdict of the jury ought to be upheld.

1869.
April 1.

REG. v. DIXON.

Jurisdiction—British-born Subject—Justice of the Peace—Imprisonment in default of payment of Fine.

A Magistrate being also a Justice of the Peace has no jurisdiction to try a British-born subject under the Penal Code. His jurisdiction in the trial of such subjects is governed and limited by 53 Geo. III., c. 155, s. 105, and Act VII. of 1853, neither of which gives him power to award imprisonment in default of payment of a fine.

THE accused, R. M. Dixon, a British-born subject, was convicted by A. H. Plunkett, a Justice of the Peace, and Magistrate F. P. in the Thánáá District, of voluntarily causing hurt, and sentenced, under Sec. 323 of the Indian Penal Code, to pay a fine of Rs. 50, or in default to undergo one week's simple imprisonment.

On a review of the Magistrate's Monthly Criminal Returns, A. Bosanquet, Acting Session Judge of Thánáá referred the case for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, with the following remark :—

"It appears from the Magistrate's proceedings that accused No. 1 is a European British subject. Mr. Plunkett had no power to try him under the Penal Code. This is so obvious that it is scarcely necessary to quote authority for it; but see pp. 191, 223, and 395 of Sadr Foujdári Adálat Reports for 1862."

The case was heard this day before COUCH, C.J., and WARDEN, J.

Dhirajlál Mathurádás, in support of the Magistrate's decision :—Though the accused is a British-born subject, the Penal Code was rightly applied to him, under Sec. 2, which says "every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof." Sec. 21 of the Code of Criminal Procedure says that the Criminal Courts shall, in the investigation and trial of offences, be guided by the provisions of the Code, and Sec. 25 provides that no person shall be

exempted from the rules of criminal procedure by reason of place of birth or of descent; and by Sec. 42 the jurisdiction given by the statute is not to be interfered with: and, therefore, if the two sections 25 and 42 are read together, a Justice of the Peace can try British-born subjects for such offences under the Penal Code as are within his cognisance as a Magistrate.

COUCH, C.J.:—The two decisions of the Sadr Court quoted were passed after the Code of Criminal Procedure had come into operation, and in the last case two Judges (Forbes and Newton, JJ.) held that the accused could not be tried under the Indian Penal Code. According to my recollection, that decision has been followed in this Court and there is no reason for thinking that it is not a right one. I, therefore, concur in it. A Magistrate being a Justice of the Peace can try a British-born subject only under 53 Geo. III., c. 155, s. 105, and Act No. VII. of 1853, but under them he has no power to award, as is done in this case, imprisonment in default of payment of the fine inflicted. We must, therefore, annul the conviction and sentence, and order the accused to be tried under the statute.

WARDEN, J., concurred.

Conviction and sentence annulled.

REG. v. JOHN CONNON.

April 12.

In re David Turnbull Stewart.

Escape from Custody under Civil Process—Sheriff's Bailiff—Offence—Act XLVIII. of 1860, Sec. 8.

To escape from custody under Civil process is not a criminal offence within the meaning of Sec. 8 of the Presidency Towns Police Amendment Act of 1860.

Quære: whether such an escape without force is a misdemeanour at Common Law.

ON the 5th of April 1869, *Pigot*, before WESTROPP, J., obtained a rule *nisi* for a writ of *certiorari* to issue directed to John Connon, Esquire, Acting Chief Magistrate of Police

1869.
REG.
v.
JOHN CONNON.

for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against David Turnbull Stewart by S. V. de Quadros, and the conviction of David T. Stewart thereon.

The rule *nisi* was allowed to issue on David T. Stewart finding two sureties severally to be bound in the sum of Rs. 500, or on his lodging Rs. 500 with the Clerk of the Crown.

The rule was granted upon an affidavit made by David T. Stewart, in which he stated that Messrs. Beyts and Fellows had obtained a decree against him on the 16th of February 1869; that on the 24th of February S. V. de Quadros, a Sheriff's bailiff, came to his house at Mazagon, and that he, having been called by a servant, went down and met De Quadros, who produced a document which he handed to him (Stewart), stating that it was an order for his arrest; that he (Stewart) laid it on the table and said to De Quadros "very well, I will come to you immediately;" that he went up and down stairs several times while De Quadros remained, and that De Quadros neither touched him, nor said "I arrest you," nor "you are in my custody," and that he did not place the least restraint upon his (Stewart's) actions; that he (Stewart) left his house, and was subsequently taken into custody by the police at Point de Galle under a warrant.

De Quadros, in his deposition before the Magistrate, related the matter almost in the same way. He said that he arrested the prisoner; that he did not put his hand on the prisoner when he did so; he did not say to prisoner "you are in my custody," nor "you are arrested;" that he showed the prisoner the warrant of the High Court, and that the prisoner read it and returned it to him; that the prisoner went upstairs saying his wife was sick; that he did not go upstairs with the prisoner; that he did not close any door; that he said to the prisoner "here is a warrant of arrest after judgment," to which the prisoner replied "very well, I will be with you immediately." And in re-examination De Quadros said "when the prisoner went upstairs I was following, but he begged me not to follow, as his wife was sick; for that reason

I did not follow him. He promised me to come down immediately. He asked me permission to have tiffin, to which I assented."

The Chief Magistrate, on convicting David T. Stewart, delivered the following judgment:—

"The defendant is before this Court charged, under Sec. 8 of Act XLVIII. of 1860, with having escaped from legal custody. The circumstances are these: On Wednesday the 3rd instant a Sheriff's bailiff, Simon Vincent de Quadros, came here and laid an information on oath before me to the following effect:—

"'I was intrusted on the 24th ultimo with the execution of a warrant of arrest after judgment in a case in the High Court, No. 955 of 1868, against David Turnbull Stewart. I arrested him in his house at Mazagon on the same day, and he was then in my lawful custody. He escaped by stratagem and fraud, and I pray that a warrant may be issued for his apprehension, and that he may be dealt with according to law.'"

"I issued a warrant accordingly, and Stewart is here a prisoner thereupon. An ingenious attempt has been made by Mr. Cleary, on his behalf, to make it appear that the arrest by the Sheriff's bailiff was not good in law; that consequently the offence charged has not been committed, and that, therefore, this Court has no jurisdiction. I have been looking into the English cases and the English law, by which of course I must be bound, and it would appear to be the better course that in making an arrest the Sheriff should actually seize or touch the defendant's body: *Gener* v. *Spark*, 1 Salk. 79. That course was not literally followed in this case. But if the officer, being in a position to arrest the defendant, uses such words as 'I arrest you,' and the defendant acquiesces and goes with the officer, it will be a good arrest: *Horner* v. *Battyn and others*, Bull. N. P. 62, per Abbott, C. J., 1 C. & P. 153. Upon the evidence I conclude that quite as much as that took place between the Sheriff's bailiff and the defendant here, and, till better in-

1869.

REG. v. JOHN CONNON.

formed than I now am, I will not hold that any particular shibboleth or form of words between the parties is required by the law. In short, there was on Stewart's part that acquiescence in the arrest which made it good, and I think he is guilty, as described, of having made his escape by stratagem and fraud. Bilking a Sheriff's bailiff, though not had in any esteem, I am sure, amongst honourable or honest men, is certainly considered socially less an offence than the crimes which we have ordinarily to punish here. But it may be as well that it should be known throughout the community, if I am right in the law which I now lay down, that it is an offence, and that we have the power, as indeed it must be our duty when a case is proved, to punish it by a considerable term of punishment, which may be made of the most degrading kind. But having in view that it is the first case of the kind, so far as I know, which has come up here, and that the defendant has already suffered somewhat in the matter, though, to be sure, he has only himself to thank for that, I will only sentence him to fourteen days' simple imprisonment from this time, and he is sentenced accordingly."

The rule came on for argument before WESTROPP and SARGENT, JJ., on the 9th of April 1869.

Scoble, instructed by the Sheriff, showed cause against the rule. Whatever may have been the law before, since the Police Amendment Act (*a*) was passed, escaping from civil custody is an offence. Sec. 8 runs thus: "Whoever escapes or attempts to escape from or out of any legal custody shall be liable to be imprisoned." The words there are "any legal custody," not as in Sec. 224 of the Penal Code, where it is made criminal to escape from legal custody in which the prisoner is for an *offence*. The words "out of any legal custody" have been introduced, instead of the words "out of any place of legal confinement," which occur in Sec. 39 of Act XIII. of 1856, to meet the case of a prisoner escaping before he reaches the place of his proposed confinement, but the expression in the earlier Act plainly includes a debtor's prison. Sec. 8 then proceeds: "and such imprisonment shall com-

(*a*) Act XLVIII. of 1860.

mence and take effect from and after the expiration of any sentence of imprisonment under which such person may be confined at the time of committing the offence aforesaid." The words "after the expiration of any *sentence* of imprisonment" do not limit the preceding part of the section, for they should be read largely as including civil process; besides, in many cases these words are redundant, as when a man is arrested by the police in the street. The very smallness of the punishment which can be inflicted shows that an escape from civil custody is intended. This is a misdemeanour at Common Law: *Regina* v. *Allan* (*b*). He also cited *The Queen* v. *Bhaji Duffedar* (*c*).

There was an arrest in this case: *Russen* v. *Lucas* (*d*), *Arrowsmith* v. *LeMesurier* (*e*), *Berry* v. *Sempronius* (*f*), *Grainger* v. *Hill* (*g*), *Horner* v. *Battyn* (*h*), *Gener* v. *Spark* (*i*), *Weavers* v. *Byrne* (*j*), *Browne* v. *Ibbetson* (*k*), *Arden* v. *Goodacre* (*l*), *Chin* v. *Morris* (*m*) *Pocock* v. *Moore* (*n*), *Harrison* v. *Hodgson* (*o*).

Pigot, in support of the rule:—The principle is clear: the cases which have been mentioned on the other side show:—(1) that words do not constitute an arrest; (2) a touch does; (3) where there are words coupled with a submission on the part of the person to be arrested, that is an arrest. [SARGENT, J.:—Are words pretending to submit a submission?] No. When the bailiff is humbugged, and, therefore, does not lay hands on the creditor, it is not sufficient. There was no act here; there must be words, therefore, amounting unequivocally to a submission: *George* v *Radford* (*p*).

As to the escape being an offence, it is clear it was not a misdemeanour at common law; and the Legislature must

(*b*) Car. & Mar. 295; 5 Jur. N. S. 296. (*c*) 2 Beng. Rep. F. B. R. 21.
(*d*) 1 Car. & P. 153. (*e*) 2 New Rep. 211.
(*f*) 5 L. J. K. B. O. S. 215. (*g*) 4 Bing. N. C. 212.
(*h*) Buller N. P. p. 62, and 1 C & P. 153 *in notis*.
(*i*) 1 Salk. 79; S. C. 1 Car. & P. 153 *in notis*. (*j*) 3 Ir. L. Rep. 439.
(*k*) 9 *Ibid.* 66 (*l*) 11 C. B. 371
(*m*) 2 C. & P. 361 (*n*). R. & M. 321. (*o*) 10 B. &C. 445
(*p*) 3 Car. and P. 464.

1869.

REG. v. JOHN CONNON.

use unambiguous words before it can create a new offence. It has not done so. Act IV. of 1867, Sec. 3, is clear to show that escape from civil process is not an offence.

Cur. adv. vult.

12th April. WESTROPP, J.:—In this case cause was shown before my brother Sargent and myself against an order *nisi* for the issue of a writ of *certiorari* to the Senior Magistrate of this island, requiring him to send up the proceedings against, and summary conviction of, the applicant, Mr. David Turnbull Stewart, under the 8th section of the Presidency Towns Police Amendment Act (XLVIII. of 1860). That conviction was "for escaping from or out of the legal custody of the Sheriff's bailiff," Simon Vincent de Quadros, who, it is said, arrested Stewart under a warrant of arrest after judgment in a suit in this Court, No. 955 of 1868 *(Beyts and another* v. *Stewart)*, issued pursuant to a Judge's order founded on the judgment, and requiring the Sheriff to bring Stewart before the sitting Judge, under Sec. 273 of the Civil Procedure Code, with a view to his final commitment in execution of the judgment.

Two questions have been raised:—(1) whether an escape from custody under civil process is punishable under Sec. 8 of the Presidency Towns Police Amendment Act of 1860; (2) whether what took place between the Sheriff's bailiff, De Quadros, and Stewart, on the 24th day of February 1869, amounted in law to an arrest: for if it did not, there could not have been any escape to be punished.

The enactment on which the first question arises is as follows: "Whoever escapes or attempts to escape from or out of any legal custody shall be liable to be imprisoned with or without hard labour for any term not exceeding three months; and such imprisonment shall commence and take effect from and after the expiration of any sentence of imprisonment under which such person may be confined at the time of committing the offence aforesaid."

In support of the conviction it has been argued by Mr. Scoble that the words "any legal custody" in that sec-

tion are sufficiently comprehensive to include custody under civil as well as custody under criminal process, and *primâ facie*, no doubt, that is so; and it has been further remarked, on the same side, that the lightness of the extreme punishment which can be inflicted, viz., imprisonment with or without hard labour for three calendar months, leads to the same conclusion.

On the other hand, it has been contended for the prisoner that the latter part of the section, which directs that the imprisonment shall take effect from the expiration of any *sentence of imprisonment* under which the party may be confined at the time of committing the offence, points to the escape from custody under criminal process only, and limits the previous words "legal custody" to custody under criminal process only.

As a guide to a satisfactory construction of this enactment, the scope and meaning of which has been thus disputed, it is desirable to consider the law on the subject of escape from custody as it stood previously to the passing of that Act.

We will first refer to the common law of England. Mr. Serjeant Hawkins, in his well-known treatise on Pleas of the Crown, Bk. 2, Ch. XVII. (on Hindrances in bringing *offenders* to public justice), says (Sec. 5): "As to such offences by the party himself, *without force* which seem properly to come under the notion of escapes, there is little remarkable in the books; and, therefore, I shall content myself with taking notice that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. And if it be so great a crime for one not arrested to fly, in order to save himself from imprisonment for a capital offence, surely it must be at least as great a crime for one who is actually

1869.

REG. v. JOHN CONNON.

under the custody of the law for any such crime, by any indirect means to free himself from it. And some have holden that such an escape amounts to felony. But this opinion seems to be over-severe, and not to be maintained by the book cited to prove it."

In that chapter the author, it will be observed, was dealing with escapes *without force*. An escape is where one who is arrested gains his liberty before he is delivered by the course of the law. And it may be by the party himself either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force by the rescuing of the party from custody. Where the liberation of the party is effected, either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself with force it is called *prison-breaking*; and where it is effected by others with force it is commonly called a *rescue* (*q*). In Bk. 2 Ch. XVIII, Sec. 1, Serjeant Hawkins treats of escapes by the party himself *with force, i. e.* prison-breaking. They stand on quite a different footing from escapes without force. He says: "As to prison breaches, as they stood by the common law, it seems the better opinion that all such offences *were* felonies, if the party were lawfully in prison for any cause whatever, whether criminal or civil, and whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him." This state of the law was modified by 1 Edw. II., Stat. 2, which enacted that thenceforth no prison-breaker "shall have judgment of life or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in time past it hath been used otherwise" (*r*). Prison breaking from lawful confinement on charges inferior to those

(*q*) 1 Russ. Cr. & Misd., p. 416, 3rd Ed. p. 581, 4th Ed.

(*r*) 4 Stephen Com. 295, 296, 4th Ed.; 2 Hawkins P. C. c. xviii. s. 3, 4, 5. 6.

of treason or felony, is still in England punishable, as for a high misprision or contempt, with fine and imprisonment (*s*). Assuming, for argument's sake, that Stewart was in custody, yet, as it is not pretended that he resorted to any force to effect his escape, it cannot be maintained that the case is one of breach of prison. Sec. 9 of Chap. XVIII., where Serjeant Hawkins says that if, without any obstruction, a prisoner go out of the prison doors, being opened by the consent or negligence of the gaoler, or other, escape without using any kind of force or violence, he is guilty of a misdemeanour only, but not of felony, and the gaoler is punishable in such manner as shall be set forth more at large in the next chapter" (to which we are now about to refer) seems applicable to prisoners in custody on criminal process, only, as the next quotation tends to show.

In Bk. 2 Ch. XIX (of Escapes suffered by Officers) Hawkins lays it down thus: "As the imprisonment must be justifiable, so must it be also for a criminal matter; and some are said to have holden that no escape is criminal but where the commitment is for felony. However, it is certain that the escape of one, committed for petit larceny only, is criminal; and it seems most agreeable to the general reason of the law that the escape of a person, committed for any other crime whatsoever, should also be criminal. For, surely, whenever the public justice requires that a person be committed for a crime, it likewise requires that he be safely kept under such commitment, and consequently may reasonably demand public satisfaction from the officer to whose custody he is committed if he neglect to keep him as he ought.

"As the imprisonment must be justifiable, and for some crime, so must its continuance at the time of the escape be grounded on that satisfaction which the public justice demands for such crime: for if a prisoner be acquitted and

(*s*) 2 Hawkins P. C. c. xviii. s. 21.
Archbold by Jervis & Welsby 693, 15th Ed. 4 Stephen Com. 296, 4th Ed.
1 Russ. Cr. and Misd. p. 427., 3rd Ed.; p. 592. 4th Ed.

1869.
REG.
v.
JOHN CONNON.

detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he be discharged paying his fees; so that, till they be paid, the first imprisonment continued lawful, as before, for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor. Yet if a person convicted of a crime be condemned to imprisonment for a certain time, and also till he pay his fees, and he escapes after such time is elapsed without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release."

Sir William Blackstone (4 Comm. 129) says: "An escape of a person arrested *upon criminal process*, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment."

Serjeant Stephen writes to the same effect (Vol. IV., p. 294, 4th ed.): "An escape of a person lawfully arrested *for crime*, whether felony or misdemeanour, by gaining his liberty before he is delivered by course of law, is also an offence against public justice."

Both Blackstone and Stephen concur in saying that "the officer permitting such escape (*i. e.*, escape from custody on criminal process) is much more culpable than the prisoner, the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice."

Sir William Russell, in his work on Crimes and Misdemeanours, referring to the passages from Hawkins and Blackstone which have been already quoted, in speaking

of punishable escapes by the party himself (Bk. II., Ch. XXXII., 3rd ed.), treats them as occurring where the party has been "arrested on *criminal* process;" and as to escapes suffered *by officers*, and punishable criminally, says that "an escape of this kind must be from a justifiable imprisonment for *a criminal matter*, after an actual arrest" (*Ibid.* s. 1) Mr. Greaves, in his recent edition (4th) of Russell's work, published in 1865, pp. 581, 582, preserves unaltered the passages just quoted. The law is similarly laid down in Archbold (15th ed., by Chief Justice Jervis and Mr. Welsby), p. 690. The imprisonment in the case of Sir Miles Hobert and William Stroud (Cro. Car. 209), from which it was alleged that they had escaped, was in respect of misdemeanour in their conduct as members of the House of Commons, and not an imprisonment for debt. The case of *Reg.* v. *Allan* (*t*) has been mentioned during the argument as throwing some doubt on the proposition that at Common Law an escape is not punishable criminally unless it be an escape from custody under criminal process. It has not been satisfactorily reported, the reasons for the decision not having been given. It seems to have been there held, on the Western Circuit, in April 1841, that it is a misdemeanour indictable at Common Law, to aid a person to escape from gaol under an order of the Insolvent Debtors' Court, granting him his discharge forthwith as to all of the debts in his schedule except two, and as to them directing him to be discharged as soon as he should have been in custody (at the suit of the creditors to whom respectively these two debts were due) for the period of thirteen calendar months. The section of the English Insolvent Debtors' Act (1 & 2 Vict., c. 110), under which this order was made, is not mentioned in either of the reports, but it would appear to have been either the 77th or 78th section, in which case, although the process in the respective suits of the detaining creditors would be civil process, yet the order of the Insolvent Debtors' Court, in so far as it deferred the insolvent's discharge from those debts for thirteen months, and, therefore, empowered those creditors to detain him in custody during that period, would be an order

(*t*) Car. & Mar. 295; S. C. 5 Jur. 296.

1869.

REG. v. JOHN CONNON

by way of punishment, and not civil in its nature. It, moreover, does not appear whether Allan, the party who aided, or Young, the party who escaped, used force. If force were employed by either, that case would not be in point. It would be rescue by Allan, and breach of prison by Young, if they used force. In the 4th ed. of Russell, Mr. Greaves has placed *Reg.* v. *Allan* in the chapter on Rescue and Active Aiding in an escape (*u*). On the whole, it is doubtful how far *Reg.* v. *Allan* can be considered as contravening the proposition of Mr. Pigot, that at common law an escape without force is not punishable criminally, unless it be an escape from custody under criminal process.

Next, turning to legislation affecting the island of Bombay, we do not find that down to the year 1856 any legislation had taken place so as to render such an escape criminal, if it were not so before. R. O. R. III. of 1827, Sec. 30, relates to escapes from the House of Correction, which is solely a criminal prison: Stat. 9 Geo. IV., c. 74, s. 31, to the escape of convicts from transportation: Act XVI. of 1852, Sec. 25, to "escape or rescue from lawful custody on a criminal charge:" Act VII. of 1854, Sec. 17, to escape from custody in respect of the heinous offences to which that Act relates. Act VIII. of 1852, Sec. 8, only provides a civil remedy, where persons, taken under Mofussil civil process within the precincts of the Presidency towns, escape from the custody of the Sheriff: so does Act VI. of 1855, Sec. 10, in the case of persons taken under civil process of the Supreme Courts of Judicature. To Act XIII. of 1856, Sec. 39, we shall presently refer.

In the Bombay Mofussil escapes from custody, under criminal process only, seem to be, and to have been, punishable as offences. Reg. XIII. of 1827, Sec. 46, applied to escapes from the criminal gaol: Reg. XIV. of 1827, Sec. 24, to forcible escapes from custody after sentence; Reg. V. of 1831 amends Reg. XIV. of 1827 by striking out the word "forcible," but applies only to escapes from custody *after sentence*: Act V. of 1858 to escapes, from gaol or other lawful custody, of persons under sentence of imprisonment for certain crimes,

(*u*) *Bk. II Ch.* 31.

or under committal for trial for certain crimes: Act XVII. of 1860 to escapes by persons from "gaol or other lawful custody whilst detained under sentence of imprisonment" for certain crimes. The Criminal Procedure Code (Act XXV. of 1861) Secs. 47, 112, 113 relate to escape from custody in criminal cases only.

The Penal Code (Act XLV. of 1860) Sec. 224, which applies as well in the Presidency towns as in the Mofussil, after providing for the case of any person offering resistance or illegal obstruction to his lawful apprehension "for any offence with which he is charged, or of which he has been convicted," provides that whoever "escapes or attempts to escape from any custody in which he is lawfully detained for any such offence," shall be punished with simple or rigorous imprisonment for a term which may extend to two years, or with fine, or with both, and such punishment is to be in addition to the punishment to which he was liable for the offence with which he was charged, or of which he was convicted.

That enactment plainly applies to escapes from custody under criminal process only. We may here observe that at the Appellate Side it has been held (2 Bom. H. C. Rep., 1st ed. 134, 2nd ed. 128) that escaping from the custody of a police peon is not a voluntary obstruction of a public servant in the discharge of his public functions within the meaning of Sec 186 of the Penal Code.

The result of our examination of Indian legislation is, that, down to the present time, escapes from custody under civil process in the Mofussil, and, down to the end of 1855, such escapes in Bombay, were not, by such legislation, rendered punishable as crimes.

Act XIII. of 1856 (the Presidency Towns Police Act), Sec. 39, which section has been repealed by the Act (XLVIII. of 1860) under which Stewart has been convicted by the Senior Magistrate, is precisely the same as the 8th section of the latter Act, upon which he has been convicted, with this exception that, in lieu of the words "from or out of any legal custody" in Sec. 8 of the latter Act, the words "out

1869.

REG. v. JOHN CONNON.

of any place of legal confinement" are found in Sec. 39 of Act XIII. of 1856.

As the words "legal custody," in the amending act, *primâ facie* are sufficiently large to include custody under civil process, so the words "place of legal confinement" are *primâ facie* sufficiently wide to comprise custody under civil process, though possibly there might be a question whether the last mentioned words would include such a peculiar case of alleged civil custody as the present. But those words are, like the words "legal custody" in the amending Act, followed by the passage which provides that the imprisonment for the escape shall take effect from and after the expiration of any *sentence of imprisonment* under which the party may be confined at the time of the escape—a passage which, as we think, points to a previous custody under criminal process, and narrows the construction of the phrase "place of legal confinement" in the original Act, and the phrase "legal custody" in the amending Act.

The phrase "lawful custody," it will be observed, occurs in Act V. of 1858 and Act XVII. of 1860, and in both of these Acts is applied to custody under criminal process only. "Legal custody" is of precisely equivalent import to "lawful custody," and was, we are inclined to think, in the amending Act under consideration, substituted for "place of legal confinement" in the original Act, in order to include cases in which persons, arrested under criminal process, had not yet reached a prison or place of confinement, or were in transit from one prison or place of confinement to another; and not with any view to include escapes from civil custody. We do not think that the words "may be," occurring in the passage "and such imprisonment shall commence" &c., "after the expiration of any sentence of imprisonment under which such person *may be* confined" &c., militate against that view. Those words are completely satisfied by the possibility that the party may, previously and up to the time of his escape, have been in custody under a criminal charge, and as yet untried, and, therefore, not under any sentence of

imprisonment. It is important to note, that no provision is made for the commencement of the imprisonment under the Act in the case of the imprisonment, from which the escape is made, being under civil process.

It being at least doubtful whether, at common law, escape from civil custody was an act punishable criminally, and up to 1856 the Legislature having in Bombay rendered escapes from custody under criminal process only punishable, and up to the present time having done no more with regard to the Mofussil; and the Penal Code, (which applies alike to the Presidency towns, and to the Mofussil,) having noticed escape from custody under criminal process only, we think that, if by Act XIII. of 1856, or the amending Act XLVIII. of 1860, the legislature intended to render escape from civil custody, without force, punishable in the Presidency towns only, it behoved it to use clear and unequivocal language for that purpose. Again, even assuming that at common law such an escape constituted an offence, it would have been no more than a misdemeanour, and, as such punishable with fine and ordinary imprisonment only. If such an escape were for the first time to be rendered punishable with imprisonment with hard labour, the Legislative should have spoken clearly. There is no better established rule of construction of statutes than that a penal statute must be construed strictly, and that the language of it must not in any respect be strained so as to include, as offences, acts which it is doubtful whether the Legislature had in its contemplation. We think the language, both of the original Act (XIII. of 1856, Sec. 39), and of the amending Act (XLVIII. of 1860, Sec. 8), such as in all probability was intended to relate to escapes from custody under criminal process only. We are fortified in that opinion when we look at the previous legislation for this island, and at the pre-existing and present state of the law in the Mofussil of this Presidency. The language of the Legislature, being at least ambiguous, we cannot safely hold that escape from civil custody is, under the enactment in question, punishable in Bombay, or support this conviction.

1869. Having arrived at that conclusion upon the first question, it becomes unnecessary for us now to express any opinion upon the second and very nice question, viz., whether anything took place on the 24th of February 1869, which in law amounted to an arrest of Stewart.

REG. v. JOHN CONNON.

The order *nisi* for the issue of a writ of *certiorari* must be made absolute.

We may observe that Sec. 111 of Act XIII. of 1856 to some extent indicates the manner in which the Magistrate should make his return to the writ.

1869. April 21.

DASTUR HUSANG JA'MA'SJI .....*Petitioner.*
R. L. FELL .....*Opponent.*

Land Disputes—Possession—Actual Possession—Inquiry by Magistrate —Crim. Proc. Code, Sec. 318.

A Magistrate, under Sec. 318 of the Crim. Proc. Code, is to inquire into the question who is in actual possession of the property in dispute, without considering how that possession has been obtained.

THIS was an application for the exercise of the High Court's extraordinary jurisdiction under Sec. 404 of the Code of Criminal Procedure.

Dorábji Pestanji Pátíl mortgaged a certain property, called the Hirábág property, to the East India Association as security for a loan of Rs. 88,000: the mortgage deed authorised the sale of the property if the principal loan were not paid off within three years. The applicant, Dastur Husang Jámásji, who held a lease of the property from Dádábhái, the son of Dorábji P. Pátíl, was in possession under his lease.

The opponent, Fell, stated that he had received a power of attorney in August 1868, from the trustees of the mortgagee, authorising him to take possession of the Hirábág property for the mortgagee; that on the receipt thereof he waited on Dastur Husang Jámásji, handed him the power of attorney, which he read, and was told by him to take possession, and

1869.

DASTUR HUSANG JA'MA'SJI. v. R. L. FELL.

referred for the keys to Rastamji Dádábhái; that on applying for them Rastamji told him he had not the keys, and had nothing to do with the property except as agent for the son of the proprietor; that accordingly he (Fell), accompanied by the *vakil*, Mr. Cross, went to Hirábág on the 30th of October 1868, found the gates open, entered the premises, took possession under the power of attorney, placed a man of his own in charge, and on the following day put his own locks on the gates of the property. Dastur Husang denied having given authority to Fell to take possession, and disputed his (Fell's) right to retain possession. Fell thereupon applied to Alexander G. Fraser, Magistrate F. P. at Puná, to take proceedings under Sec. 318 of the Code of Criminal Procedure. The Magistrate considered that Fell had obtained the authority of Dastur Husang to take possession of the property; that he accordingly took possession, not by force, nor multitude of hands, but quietly, unopposed, and by legal authority; but observed that, assuming the possession of Fell to be illegal, the fact that the Legislature had provided a remedy in such cases in Act XIV. of 1859, Sec. 15, warranted the inference that the Legislature intended the Magistrate should decide in cases of disputed possession without reference to the way in which possession was obtained. The Magistrate, therefore, without reference to the merits of either party to a right of possession, proceeded to inquire which party was in actual possession, and finding that Fell was in such possession, forbade all disturbance of it until such time as he was ousted by due course of law.

Against this order Dastur Husang having presented the present application to the High Court, and the case was heard before COUCH, C.J., and NEWTON, J.

Marriott, for the petitioner:—The Magistrate says that possession, if once obtained, whether legally or not, cannot be disturbed unless by due course of law. But Sec. 318 of the Code of Criminal Procedure does not protect possession obtained illegally, *e.g.*, by force or fraud. Suppose a trespasser to enter into a vacant bungalow, can he be said to be

1869.

DASTUR HUSANG JA'MA'SJI. v. R. L. FELL.

in possession of it. Here the possession obtained was fraudulent and by trespass.

G. F. Rimington, for the opponent.

COUCH, C.J.,:—In this case the Magistrate has found that Fell is in actual possession of the property, and that this possession was obtained under the authority of the Dastur, and it does not appear that the power of attorney which Fell held from the trustees of the mortgagees was ever revoked; but this is immaterial, for Sec. 318 of the Code of Criminal Procedure requires the Magistrate merely to see which party is in actual possession of the property in dispute, since it provides that in cases of disputes relating to the possession of land, premises, &c., the Magistrate shall call on all parties concerned in such dispute to attend his court, and "to give in a written statement of their respective claims, as respects the *fact of actual possession* of the subject of dispute." In another part of the section it is provided that "the Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire which party is *in possession* of the subject of dispute," and though the word "*actual*" does not occur in this part of the section, we must read that part with reference to what precedes it. It cannot be supposed that where the Magistrate is to call upon the parties to give in their statements as respects the fact of actual possession only, he is to go into the question of legal possession, which it is for the civil court alone to decide. The object of the interposition of the Magistrate under the section is to prevent a breach of the peace, and with that view he should keep in possession the party which is found to be in actual possession. The Magistrate here has inquired into the fact of actual possession, and has found that Fell was in such possession. The propriety of this finding on the evidence cannot be questioned here, and, as there is no ground for holding that an error in law has been committed by the Magistrate, we must reject the application.

NEWTON, J., concurred.

Petition rejected.

REG. v. GIRDHAR DHARAMDA'S.

1869. March 5

Conversion of property of deceased person—Indian Penal Code, Sec. 404—Report, Power of Sessions Judge to call for.

Held, that Sec. 404 of the Indian Penal Code (relating to the misappropriation or conversion of "property" left by a deceased person) does not apply to immoveable property.

A Sessions Judge ought not to call for a report from the Magistrate of the District in any case in which it is not competent to such Sessions Judge to call for the record and proceedings, (*e.g.*) in the case of a person tried by a Subordinate Magistrate who has appealed to the District Magistrate.

In trials held by the Magistrate of the District or Magistrate F. P. in which the Sessions Judge can call for the record and proceedings he has power also to call for a report.

THIS case was referred for the orders of the High Court by W. Sandwith, Acting Session Judge of Ahmedábád, under Sec. 434 of the Code of Criminal Procedure.

The facts of the case appear from the reference of the Sessions Judge:

"One Dáná Vasji died intestate in February 1867, leaving a house and other property. This being reported by the Magisterial department to the District Court, the Názar was directed to administer to the estate; and on the latter deputing his *kárkun* to receive possession of the said house from the village authorities, it appeared that the petitioner, Girdhar, had taken possession, and refused to give up the house. Girdhar was thereupon charged by the Subordinate Magistrate of Daskrohi with dishonest misappropriation of property possessed by a deceased person at the time of his death under Sec. 404 of the Indian Penal Code, was convicted of the same, and sentenced to imprisonment and fine.

"On appeal, the Acting Magistrate of the District saw no reason to interfere with the Subordinate Magistrate's finding.

"Dissatisfied with this, Girdhar has petitioned this Court, under Sec. 434 of the Code of Criminal Procedure on the following grounds:—(1) that Sec. 404 of the Indian Penal Code is not applicable to immoveable, but only to moveable, property; (2) that the evidence tendered by him (Girdhar) was not taken; (3) that he offered in evidence the deed of

1869.

REG. v. GIRDHAR DHARAMDA'S.

sale of the property in dispute, which was not received; (4) that the dishonest taking of the property is not proved; (5) that the matter is one for a Civil Court to adjudicate upon; (6) that the illegal proceedings of the Subordinate Magistrate having been confirmed in appeal by the Acting Magistrate of the District, the proceedings of the latter are likewise illegal.

"The Acting District Magistrate was requested to report on the above petition, and certify the record in the case.

"Mr. Borradaile, in forwarding the record, has declined to furnish the report, on the ground that this Court has not authority to call for such a report.

"With reference to the Magistrate's objection, I am of opinion that it is competent to the Court of Sessions to call for a report. It is true that Sec. 434 of the Criminal Procedure Code only specifies the 'record,' but a report also is surely within the meaning and spirit of the said section. I found on joining this Court that my predecessor had on several occasions called for a report which was furnished without objection by the Magistrates; and I, therefore, followed the same practice, and consider that it is extremely useful as affording the Magistrates an opportunity of noticing allegations in petitions affecting them personally, and also as an aid to the Court of Sessions in facilitating the transaction of business in miscellaneous matters, and in cases under Chap. XVI. of the Criminal Procedure Code, in which there may have been no English record kept.

"As regards para. 3 of the Acting District Magistrate's return, I would remark that although, doubtless, a Subordinate Magistrate is immediately subordinate to the Magistrate of the District, the latter officer is, by Sec. 434, immediately subordinate to the Court of Sessions in respect of the legality of any sentence or order passed by him; and if, as in this case, any doubt attaches to the order rejecting the petition of appeal, it is competent to the Court of Sessions to call for the record, in order to satisfy itself as to the legality and regularity, or otherwise, of the order passed by the Acting Magistrate.

1869.

REG. v. GIRDHAR DHARANDA'S.

"In regard to the allegations in the petition to this Court, there seems to be much doubt whether immoveable property is within the meaning of Sec. 404 of the Indian Penal Code; for, although 'property' is the term used in the said section, the single illustration below the section refers to moveable property only; and the meaning and object of the section appear to be to prevent the unlawful appropriation of moveables between the decease of the owner and the time when the effects should, in ordinary course, be received by the heir or person authorized to receive them. * * *

"Therefore, on the questions: (1) of the illegality of the order of the Magistrate in respect of the denial of the right of producing evidence for the defence; (2) whether an offence relating to immoveable property be within the meaning of Sec. 404 of the Indian Penal Code; (3) whether the Court of Session is authorised to call for a report from any Magistrate under Sec. 434 of the Criminal Procedure Code; and (4) whether it is competent to the Court of Sessions to call for the record of a case such as the present one under the same section, I beg to refer the case for the orders of the High Court."

PER CURIAM—(TUCKER and GIBBS, JJ.):—The Court reverses the conviction and sentence of the Subordinate Magistrate, and directs that the fine, if levied, be returned, as the Judges are of opinion that reading Secs. 403 and 404 together, the latter section applies only to moveable property.

The Sessions Judge is to be informed that, as the Court of a Subordinate Magistrate is not a Court immediately subordinate to the Sessions Court, he has no authority to call for the record and proceedings of that Court. If persons complain before him that an error of law has been committed by a Subordinate Magistrate, and not corrected in appeal by the District Magistrate, the Sessions Judge should refer them to the High Court, who can deal with their complaint under Sec. 404 of the Criminal Procedure Code.

Conviction and sentence annulled.

1869.
REG. v. GIRDHAR DHARAMDA'S.

After this order was communicated to the Sessions Judge he solicited the High Court's decision on one of the points submitted by him; namely, whether it is competent to a Court of Sessions to call for a report from the Magistrate of the District, or a Magistrate F. P., on proceedings, the legality of which is under consideration by the Sessions Court, under Sec. 434 of the Code of Criminal Procedure; and the following resolution on the point was passed in Chambers on the 6th of April 1869:—

In the opinion of the Judges, the Sessions Judge ought not to call for a report from the Magistrate of the District in any case in which it is not competent to him to call for and examine the record and proceedings. But in trials held by the Magistrate of the District, or a Magistrate F. P., in which the Sessions Judge can call for the record and proceedings, he has also authority to call for a report.

April 21.

REG. v. RA'MCHANDRA' EKNA'TH, *et al.*

Written order issued by Magistrate—Criminal Procedure Code, Secs. 62 *and* 318.

The temple of Pandharpur, a public temple, is visited at certain periods of the year by a large concourse of pilgrims. With a view to prevent the dangers arising from overcrowding, and to improve the ventilation, the Magistrate F. P., by a written order, under Sec. 62 of the Criminal Procedure Code, directed the hereditary priests of the temple to widen and heighten the doorway.

Held, that such order was legal under the above Section.

Semble, that the case would have been the same had the temple been private property; *and also* that the power of Magistrates to issue orders under the Section in question is entirely discretionary.

THIS was an application for the exercise of the High Court's jurisdiction under Sec. 404 of the Code of Criminal Procedure.

There is a temple dedicated to the god Vithobá at Pandharpúr, in the district of Puṇá; and Hindús in large crowds visit it for religious purposes on several occasions during the year. In consequence of there being no proper ventilation,

1869.

REG. v. RA'MCHANDRA' EKNA'TH, et al.

or means of ingress and egress, A. Jervoise, Magistrate F. P., under Sec. 62 of the Code of Criminal Procedure, issued the following order to the accused, who were in possession and had the management of the temple:—

"Many pilgrims are drawn together on the occasion of the *jatrá* (or pilgrimage) of Pandharpúr; and in consequence of there not being as much ventilation in the temple of Viṭhobá as is required, and in consequence of the means of ingress and egress not being proper, there is a probability of much injury being caused to the lives and health of the people.

"In the Resolution of Government No. 177, dated the 25th of January 1863, it has been directed that the front doorway, *i.e.*, the doorway of the inmost division of the temple, should be widened as much as possible; and I am given to understand that it will be practicable, without injuring the temple, to widen the said doorway to the extent of five feet in width and seven feet and six inches in height. You are, therefore, ordered to make the said doorway five feet in width and seven feet and six inches in height within one month from the receipt of this order. If you fail to do so, you shall each be liable to the punishment mentioned in Sec. 188 of the Indian Penal Code. (Dated) The 23th of February 1868."

The accused did not carry out this order. They were, therefore, under Sec. 188 of the Indian Penal Code, tried for disobedience of it by Krishṇaráv Trimbak, the Subordinate Magistrate of the first class at Pandharpúr, and were sentenced each to pay a fine of Rs. 200 (two hundred); or, in default of payment, to suffer imprisonment for a month and a-half. On appeal, the conviction and sentence were confirmed by A. C. Jervoise, Magistrate F. P. at Solapúr.

His finding was as follows:—

"The appellant's *vakil* advances the following objections to the convictions:—(1) That the temple, being the private property of the appellants and their fellow managers, the order of the Magistrate for alterations to be made in the

1869.

REG. v. RA'MCHANDRA' ERNA'TH, *et al.*

building was illegal; (2) That the order, as enjoining on the managers of the temple a proceeding which would offend their religious prejudices, was illegally issued; (3) That Government possesses no right of interference within the temple walls; (4) That the carrying out of the order would cause injury to the temple building; and that the order is, therefore, not justifiable; (5) That the Magistrate of the district had already, in a letter, No. 2059 of 1866, pronounced that orders affecting the building in question could not be issued by him as Magistrate.

"After due consideration of the above objections, this Court records the following decision:—

"With reference to the first objection, this Court rejects the groundwork of it; namely, that the temple is the private property of the managers, *i.e.*, the appellants and their co-managers. The temple itself is a building for the resort of the religious public, and is supported by the contributions of the public. Its affairs are managed by an hereditary priesthood, of which appellants form a portion; and this priesthood is supported by the income of the temple, derived from the casual and voluntary contributions of the visitors to the temple. So far from its being the private property of the appellants, it is, legally, property belonging to the public, whose servants the appellants are, as managers of its ceremonys, and trustees of its income, and of the property, jewels, &c., presented to it by the public. The Court further overrules this objection on the wording of Sec. 62 of the Criminal Procedure Code, which allows a Magistrate 'to direct any person to take certain order with certain property *in his possession*.' The circumstance of the order in question being directed against private property, cannot, therefore, render it illegal.

"With reference to the appellants' second objection, namely, that the order is illegal as affecting the religious prejudices of the managers and others, the Court considers first the question, does it affect such prejudices; *i.e.*, would the widening and heightening of the doorway be contrary to the Shástrás of the appellants. Without any direct evidence on

this point before it, the Court decides it on the inference to be derived from an order issued in 1783-84 by the Pesháv Mádhavráv Náráyaṇ to the Kamávisdár of Pandharpúr. The said order was issued partly on the same grounds as the one issued by the Magistrate, against which objection is taken in this appeal, namely, that action was necessary on the part of the Government to prevent danger to human life and health calculated to ensue when the temple was crowded with pilgrims. A portion of this order runs as follows:—

'In the 3rd square (*chauk*) there is a gate to the south, but in the days of the *jatrá* the place becomes quite dark, owing to the crowds. There was a gate opposite on the north side; this gate has now been walled up, and a Mároti's idol placed there. The idol should now be removed, and placed in the temple. The door should be opened, and a stone bored with large holes, so as to admit light and air freely, &c. * * * Orders have been issued to carry out the seven points above noticed, and some of the Huzur men are sent from here. The above arrangement should be made in concert with them.'

"The above order issued by the Peshvá is good evidence that the Government possessed the knowledge that religious prejudices would not be affected by certain alterations being made in the temple buildings; and it may be fairly presumed, in the absence of evidence to the contrary, that if the Government, in the interests of the visitors to the temple, could direct a walled-up door in the building to be opened, and the wall of the temple to be bored with large air holes, it had also the power, without affecting religious prejudices, to order a doorway of the same building to be widened or enlarged in any way. The present Government have not, in the opinion of this Court, lost or resigned such a right; and the exercise of it cannot, at the present time, be said to wound the religious feelings of the community more than it formerly did.

"The third objection advanced by the appellants is sufficiently met by the Court's decision on the 1st and 2nd

1869.
REG. v. RA'MCHANDRA' EKNA TH, *et al.*

objections. On the fourth objection the Court cannot properly decide, it being impossible to arrive at a correct decision without a personal examination of the interior of the temple which the appellants will not permit on religious grounds. But a reference to the records of the Magistrate's office being made, the following statement appears in a letter from a Full Power Magistrate, Mr. Vishṇu Parsharám, who has had numerous opportunities of inspecting the interior of the temple.

'There is ample room to make a door 4 feet by 7 feet clear space, and the door can be made *without the least injury to the main building.*'

"The fifth objection of the appellants is not one to which it is necessary to reply, as an expression of opinion given vent to by one Magistrate does not affect the legal position of another.'

The case was heard this day before COUCH, C. J., and NEWTON, J.

Marriot (with him *Shántárám Náráyaṇ*) for the accused. The Magistrate had, it is submitted, no power to issue this order. The building itself is not injurious to human life, health, or safety, but it is the manner in which the property may be used that may render it dangerous. It may be that the Magistrate, by posting policemen, or making other arrangements can prevent people from going into the temple in such numbers as to render the overcrowding dangerous, but the temple itself cannot be interfered with. Besides, Sec. 62 applies only to cases where an *immediate* remedy is required and the danger is imminent, which was not the case here. Sec. 62 should be read in connection with Sec. 308, and its operation so confined to dangers affecting the general public; if not, the occupiers or tenants of a house could go to the Magistrate and complain that the owner of the house has not made proper arrangements for their convenience and comfort, and for preventing annoyance to them, which cannot have been contemplated by the Legislature. There must therefore be certain limits to the application of the

section. That limit, I submit, is to be found in its application only to acts or omissions which directly endanger the health, &c., of the public, and not those which endanger the health, &c., of private persons. Here certain Hindús alone are allowed access to the temple, and not the public in general.

White (with him *Dhirajlál Máthurádás*) in support of the order:—Of the propriety of the order in this case there can be no question. The doorway is, in its present state, only 5¼ feet high and 2¾ feet wide. It opens into an ante-chamber in area 8¼ by 5¼ feet, and in height 11¼ feet, which has a ventilating opening in the roof about 5 inches square. The ante-chamber leads to the idol chamber, which is a space 8 feet by 8, covered with a domed roof about 30 feet high. The temple is held in high veneration amongst the Hindús, and is visited by numerous pilgrims of all castes. In the months of July and October of each year there is an immense concourse of pilgrims, varying from 50,000 to 100,000 souls, and the religious observances in these months are continued for a fortnight, night and day.

Any measure therefore to increase the ventilation would tend to prevent danger to the health of the worshippers. Sec. 62 is for the benefit of persons lawfully employed, which the pilgrims here are. Proprietors of mills, machineries, &c., are required to take order with their property, with a view to prevent danger to the security of the workmen and visitors.

COUCH, C. J.:—We are of opinion that the Magistrate had power to make the order under Sec. 62 of the Code of Criminal Procedure. The words of the section are very wide, and are: "It shall be lawful for any Magistrate, by a written order, to direct any person * * to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tend to prevent, * * injury or risk of * * injury to any persons lawfully employed, or is likely to prevent, or tend to prevent, danger to human life, health, or safety." In this case the accused were in

1869.

REG. v. RA'MCHANDRA' EKNA'TH, *et al.*

possession and management of the temple, and the Magistrate considered, and we think he reasonably considered, that the direction given for widening and heightening the door would prevent danger to human life or safety; and therefore the order is within the terms of the section. The Magistrate F. P. who heard the appeal in this case has found the property to be public, and in dealing with the case as brought before us we must take the fact to be as found by him. The contention that Sec. 62 does not apply to private property does not arise here; since the present case cannot be considered as one of private property, and the injury as one to private persons. Even if the property was private we think that the section would apply under the circumstances of this case; as the building is a place open to all the Hindú public, who are invited to it, and who have a right to go there on paying the customary offerings to the idol. It is contended that there should be some limit to the application of the section, but it is not necessary for us to fix that limit, since it is always to be remembered that this power is discretionary, and I am not at all certain that the discretion of the Magistrate is not intended to be the limit. In point of law no ground is shown in this case for our interference. We must therefore reject the petition.

NEWTON, J., concurred.

Petition rejected.

REG. v. GANGA'RA'M MA'LJI.

1869. June 24.

Forgery—Using forged document—Charge—Indian Penal Code, Secs. 466, 467 and 471.

The prisoner was charged under Sec. 471 of the Indian Penal Code with fraudulently using as genuine a forged document, and having been tried before a Session Judge and Jury, was convicted of that offence.

The Session Judge, considering the forged document to be of the nature of those specified in Sec. 467, sentenced the prisoner to 10 years' transportation.

On appeal, the High Court held that the charge should have distinctly set forth the offence as that of using a forged document of the nature of those specified in Sec. 467, and that, that not having been done, the trial by Jury was illegal. The conviction and sentence were therefore annulled, and it was directed that the prisoner should be retried.

THE prisoner, under Sec. 471 of the Indian Penal Code, was tried before Francis Lloyd, Session Judge of Puṇá, and a jury, on the charge of using as genuine a forged document, and being found guilty, was sentenced to be transported for ten years.

From the conviction and sentence the prisoner appealed, and on the 24th June 1869 the appeal was heard by WARDEN and GIBBS, JJ.

Macpherson (with him *Pándurang Balibhadra*) for the appellant:—The accused being charged under Sec. 471 of the Indian Penal Code with using as genuine a forged document, could not be tried by a jury, as Sec. 465, which prescribes the punishment for forging or using as genuine documents not being of the nature of those specified in Secs. 466 and 467, lays down the maximum of imprisonment as two years. The notification of Government dated 31st October 1866, authorising trials by jury at Puṇá is as follows:—"The Honourable the Governor in Council is pleased, under the provisions of Sec. 322 of the Criminal Procedure Code, to order that, from the 1st of January 1867 the trial by the Court of Session at Puṇá, of all offences for which, under Ch. XVIII. (*of offences relating to documents or trade or property marks*), the punishment awardable is death, transportation for life, or transportation or imprisonment for a period extending to ten years or upwards, and

1869.
REG. v. GANGA'RA'M MA'LJI.

also of all abetments of or attempts to commit any of the offences above described, shall be by jury in the Puṇá District."

The Session Judge attempts to give jurisdiction to the jury by treating the document in this case as a valuable security, the using or forgery of which is, under Sec. 467, punishable with transportation for life, or imprisonment extending to a period of ten years. This, I submit, he cannot do. If he thought the document was a valuable security he should have specifically laid a charge, under Sec. 467, so that the accused might have an opportunity of adducing evidence to show that it was not a document of that nature.

Dhirajlál Mathurádás for the Crown:—The construction of a document is a point of law for the decision of the Judge alone. The document in question was considered by the Judge to purport to be a valuable security, the charge of using which is triable by jury.

PER CURIAM:—In this case the prisoner was charged, under Sec. 471 of the Indian Penal Code, simply with using a forged instrument. He was convicted under the same section; and then the Session Judge, because he considered the document forged, was of the special nature of those mentioned in Sec. 467, and not a simple document, as in Sec. 465, passed a sentence upon the prisoner of ten years' transportation.

We consider that the proceedings of the Session Judge must be set aside, as the charge should have been distinctly for using a forged document of the nature of those set forth in Sec. 467; otherwise, the Session Judge had no jurisdiction to try the case with a jury. Besides, there was no mention made in the charge to the jury of the nature of the document. We are, therefore, constrained to annul the proceedings, and direct that the prisoner be retried, either on the charge of using a forged document of the nature of those mentioned in Sec. 467, or on such other charge as the Magistrate may deem right.

Conviction and sentence annulled.

REG. v. MALHA'RI LAUJI, *et al.*

1869. June 24.

Appeal from Summary Determination of Zillá Magistrate—Act XXXV. of 1850, Sec. 16 (Bombay Ferries' Act).

An appeal lies from the summary determination of the Magistrate of a Zillá, under Sec. 16 of Act XXXV. of 1850 (An Act for Regulating the Bombay Ferries) to the Session Judge. Such appeal need not be preferred within eight days under Sec. 14 of Reg. XIX. of 1827.

THE accused were convicted by J. W. Robertson, District Magistrate of Thánáṇ, of having conveyed for hire passengers without a license, and were sentenced, under Sec. 14 of Act XXXV. of 1850, each to pay a fine of Rs. 200 to be recovered, if not paid, as laid down in Sec. 14 of Reg. XIX. of 1827.

On appeal, the Acting Session Judge, A. Bosanquet, confirmed the conviction, but reduced the fine to Rs. 50, the same to be recovered as directed by Sec. 16 of Act XXXV. of 1850.

After the order of the Session Judge was communicated to the District Magistrate, the latter addressed a letter to the Registrar of the High Court containing the following remarks:—

"The fines not having been paid, recourse for their recovery was accordingly had, as laid down in Sec. 14 of Reg. XIX. of 1827, under which an appeal must be preferred within eight days 'as hereinafter allowed.'

"Such appeal in this instance not having been preferred for upwards of eight days (some fifteen days having elapsed after the decision), the Session Judge, I am of opinion, was not, under the circumstances, empowered to pass the decree on appeal setting aside the order of this Court by which he has reduced the amount of fine imposed from Rs. 200 to Rs. 50.

"Sec. 16 of Act XXXV. of 1850 states that 'all offences against this Act shall be summarily heard and determined by the Magistrate of the zillá,' from which it would appear that an appeal will not lie, as the Magistrate has full power to dispose of such cases *in a summary manner*—an opinion

1869.

REG. v. MALHA'RI LAUJI, *et al.*

which would seem to be confirmed *from the summary process authorized* for the levy of all fines inflicted under the Act.

"Should the view I take be ruled to be correct, I have the honour respectfully to request that the order of the Sessions Court passed against this Court's decision in this case may be set aside; first, on the ground that such Court is not empowered to accept an appeal against any decision passed and determined summarily under Sec. 16 of Act XXXV. of 1850; and, secondly, that should an appeal lie against such decision, it ought to have been preferred *within eight days*, as directed in Sec. 14 of Reg. XIX. of 1827."

The Acting Session Judge, on being required by the High Court to furnish a report on the matter, reported as follows:—

"The District Magistrate's sentence was passed under a local law, Sec. 16 of Act XXXV. of 1850. I consider that an appeal lay to the Session Court from that sentence under Secs. 5, 21, and 409 of the Criminal Procedure Code.

"The District Magistrate contends that under Sec. 16 of Act XXXV. of 1850, and Sec. 14 of Reg. XIX. of 1827, his sentence is final. The first-named section enacts that all offences under the Act shall be summarily heard and determined by the Magistrate of the zillá, and that all penalties shall be recovered in the manner directed in the last named section. I submit, first, that 'summarily' means 'immediately,' or 'without delay,' and does not mean that the sentence is final; and, secondly, that the words 'All penalties shall be recovered in the manner directed for the recovery of the fines specified in clauses 1, 2, and 3 of Sec. 14 of Reg. XIX. of 1827 of the Bombay Code,' must be held to be modified by Secs. 5, 21, 409 and 415 of the Criminal Procedure Code."

PER CURIAM—(WARDEN and GIBBS, JJ.):—The Magistrate is to be informed that this Court concurs with the Session Judge that an appeal will lie; and that Sec. 14 of Reg. XIX. of 1827 refers only to the Courts of Petty Session in Bombay.

REG. v. RA'MSWA'MI' MUDLIA'R.

1869. Aug. 18.

Trial by jury—Illegal evidence, admission of—Appeal—Crim. Proc. Code, Sec. 426—Act II. of 1855, Sec. 57.

Appeals from convictions on trials by jury, where illegal evidence has been admitted, should be dealt with on the same principles as appeals in which there has been a misdirection by the Judge or an omission on his part to give the jury proper direction.

The Appellate Court, where it finds that illegal evidence has been admitted, should consider whether it is such as is likely to have exercised a prejudicial influence on the minds of the jury, and if the Court be of opinion that it is so, it will treat the case as if it had been tried by a Session Judge with the aid of assessors. If the evidence, (after omitting that portion of it which should not have been admitted,) is sufficient to sustain the verdict, the conviction will be upheld.

In exceptional cases, where the evidence is of such a character as to suggest the consideration that its real value cannot fairly be appreciated, except by a Court which has heard that evidence given, a new trial will be directed.

THE prisoner, on the 3rd of March 1869, was tried before F. Lloyd, Session Judge of Puṇá, and a jury (under Section 471 of the Indian Penal Code), on a charge of using as genuine a forged document (to wit) a false currency note for Rs. 1,000. Four out of five jurymen having found the prisoner guilty, he was by the Judge sentenced to be transported for seven years, and to pay a fine of Rs. 3,000. It was also ordered that this sum should be recovered by a sale of the prisoner's property, and Rs. 1,000 given to the Great Indian Peninsular Railway Company, upon whom the fraud had been committed.

From the conviction and sentence the prisoner appealed, and on the 4th of August 1869 the appeal was heard before WARDEN and MELVILL, JJ.

McCulloch (with him *Páṇḍurang Balibhadra*) for the prisoner:—The grounds of appeal are, first, admission of illegal evidence, and second, misdirection. The evidence of three of the witnesses for the prosecution is more or less hearsay, and should not have been admitted. It is impossible to say what weight it may have had with the jury. The trial it therefore vitiated, and ought to be set aside on this ground alone. But the Session Judge has omitted to give a proper

1869.
REG. v. RA'MSWA'MI' MUDLIA'R.

direction to the jury. Some of the witnesses speak to a dealing with the false note by Bábáji, the prisoner's servant, the day before the prisoner is alleged to have passed it, but make no mention of the prisoner himself taking any part in that dealing, and yet the Session Judge has omitted to tell the jury that in criminal cases the general liability of the master for the acts of his servant does not exist, and that therefore the evidence regarding the latter did not affect the former. The Session Judge should also have drawn the attention of the jury to the danger of giving implicit reliance to the evidence of Rangnáth, the leading witness for the prosecution, and the person whom the prisoner requested to cash the false note. This man was arrested along with the prisoner, but the Magistrate who conducted the preliminary investigation *dismissed* the charge against him. The Session Judge, however, told the jury that he was formally acquitted. He represented him as in a position of safety which he did not occupy as he is still open to a trial, for if the prisoner, Rámswámi, should be acquitted, he would most probably be put upon his trial. The Session Judge should, therefore, have cautioned the jury that there was that danger hanging over his head. A new trial should be ordered, as the High Court in an appeal from a conviction by a jury, have no power to go into the evidence.

Dhirájlál Mathurádás for the prosecution :—If hearsay evidence has been admitted, it is competent to the Court to set it on one side, and consider whether the conviction can be upheld on the rest: Act II. of 1855, Sec. 57, *Reg.* v. *Fattechand Vastáchand* (*a*), *Reg.* v. *Elahee Buksh* (*b*).

Cur. adv. vult.

18th August—MELVILL, J.:—The appellant, Rámswámi, has been convicted by a jury of using as genuine a forged document, and his counsel has urged us to direct a new trial, on the grounds of the improper admission of evidence, and of misdirection to the jury. The learned counsel showed conclusively that there had been certain errors of

(*a*) 5 Bom. H. C. Rep. Cr. Ca. 85. (*b*) 5 Calc. W. Rep. Cr. R. 80.

procedure of greater or less importance, and, this being the first appeal of the kind which has come before me, I expressed a wish that judgment might be reserved, in order that I might consider, as a general question, how far such errors render it necessary or right for an Appellate Court to interfere with the verdict of a jury.

I have since had the advantage of reading the judgment of the High Court of Calcutta in the case of *Elahee Buksh* (*ubi supra*), and of a divisional bench of this Court in the case of *Fattechand Vastáchand* and three others (*supra*). The conclusions arrived at in these judgments, and in which I generally concur, may be stated, so far as they are applicable to the present case, as follows: 1.—That any misdirection by the Judge or any omission to give to the jury such advice as to the evidence, as a Judge, in the exercise of a sound judicial discretion ought to give, amounts to an error in law. 2.—That, nevertheless, the verdict and conviction ought not to be set aside if the prisoner has not been prejudiced by such error; nor should it be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that, upon that evidence, they would have upheld the conviction on appeal, if the trial had been by the Judge with the aid of assessors instead of by jury. The question of the improper admission of evidence did not come under consideration in either of the above cases, but it may be fairly dealt with on the same principles. In the record of almost every case tried by jury in the Mofussil I believe that some evidence would be found which, according to the strict rules of English law, would be inadmissible. I say this without casting any reflection upon the Judges who preside over such trials. They are not legally bound to follow the English law as such, and, as observed by the Indian Law Commissioners in their Fifth Report, much evidence, which the English law renders inadmissible because it is likely to mislead a jury, may properly be admitted by a Judge who is trying a case without a jury. It is obvious that a Judge who, in his ordinary work, feels himself unfettered by the more stringent rules of evidence, is likely, on

1869.

REG. v. RA'MSWA'MI' MUDLIA'R.

the rare occasions on which he presides over trials by jury, to allow evidence to be given which might properly convey information to his own mind, but which is likely to have undue influence upon a jury, and which, therefore, it would be safer to reject. This likelihood is increased by the circumstance that, in the Mofussil Courts, the duty of objecting to irregular questions is very inefficiently performed by the pleaders. It follows that, as I have said, it is almost certain that some evidence will creep into the record which an Appellate Court will consider to be not properly admissible.

Is then every trial necessarily to be vitiated by the admission of such evidence? If this were so, I think that, to use the words of Sir Barnes Peacock in the case above referred to, "a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by jury has been extended." The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts. But it does not follow that, on this account, the appellant is entitled to be acquitted and discharged, or even to have the advantage of a new trial. Section 57 of Act II. of 1855, and Section 426 of the Code of Criminal Procedure are expressly designed to obviate any such conclusion, and to prevent the inconvenience and possible failure of justice which it would involve. If the Appellate Court think that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the Appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by

the Judge with the aid of assessors, and if it consider that the evidence (after omitting that portion of it which should not have been admitted) is sufficient to sustain the verdict, it is at liberty to confirm the conviction.

It may happen in some cases that the Appellate Court will think it desirable to order a new trial, because the evidence on the record is of such a character as to suggest the consideration that its real value cannot be fairly appreciated except by a Court which has the advantage of hearing the evidence given. But in all cases in which it is possible to do so satisfactorily, I think the Appellate Court should form its own conclusions on the evidence, and that it should not, save in exceptional instances, direct a new trial.

I proceed to apply the preceding observations to the case before me. After giving the best consideration in my power to the arguments of the learned counsel for the appellant, I have come to the conclusion that he has shown that there has been an improper admission of certain evidence of such a nature that it was likely to exercise upon the minds of the jury an unfair influence, to the prejudice of the accused; and that, in summing up to the jury the Judge not only omitted to warn them against allowing themselves to be so influenced, but even misdirected them as to the bearing of the evidence upon the guilt of the accused Rámswámi. The portion of the Judge's summing up to which I allude is as follows:— "Jánráv, Bábáji, and Dádu Míyá have been called to show that Rámswámi did make an attempt to pass a thousand rupee note in the bazár of Solápúr, and that one is the note now before the Court. It is quite true, as asserted by the *vakil*, that these witnesses were not examined until the case had been otherwise concluded, but it is not to be assumed that they are necessarily false in consequence, and you must give this evidence what consideration you think it deserves." On turning to the evidence referred to, it appears that (except in one particular, mentioned by witness Jánráv) there is nothing to connect Rámswámi with the alleged attempt to pass the note in the bazár. The attempt was made by his servant, but the relation of master

1869.
REG.
v.
RAMSWA'MI' MUDLIA'R.

and servant cannot be admitted as making the act of the servant evidence against the master. The greater part of the evidence of the three witnesses named is mere hearsay, and such hearsay as it is particularly dangerous to submit to a jury. One of the witnesses (Bábáji) deposed as follows:—"I know accused and Bábáji, accused's writer. About two months ago Bábáji showed me a note in the bazár. He said it was for rupees one thousand, and he wanted change. I said I would not take it without Rámswámi's signature, as Bábáji told me it belonged to Rámswámi. Bábáji said it is signed by Rámswámi, and showed me a name written in English on the back." It is impossible to say to what extent the jury may have been influenced by such a statement as this, when the Judge allowed them to suppose that it was evidence of an attempt by Rámswámi to change the note in the bazár. I think that the admission of this evidence, and the misdirection in regard to it, constitute an error in the proceedings, by which the accused has been prejudiced; and that he is therefore entitled to have the evidence against him considered by this Court, without reference to the verdict of the jury upon the facts.

After carefully considering the evidence, I feel some difficulty in arriving at a conclusion, not because the evidence is insufficient in itself to sustain the conviction, but because it is of such a character as to render it difficult to pronounce upon its value without having an opportunity of hearing the evidence given. It consists of the deposition of a person who was himself charged before the Magistrate with uttering the forged note, and of the brother and fellow-clerk of this person. I am far from wishing to cast a suspicion upon the truth of their evidence; but it is open to the objection which has been made to it by the appellant's counsel, viz., that it is not disinterested, and that the witnesses (or at least two of them) have a manifest reason for wishing to fix the guilt upon another person. It is quite possible that a tribunal which saw and heard these witnesses depose would be fully satisfied of their veracity; but it is difficult for a Court, which has not this advantage, to feel

justified in attaching full credence to the statements of witnesses whose interests it clearly is to make such statements. I think it would be better to order a new trial, partly for the reason which I have mentioned, and partly because I think that further inquiry may have the effect of strengthening the case. The appellant's servant, Bábáji, might himself be examined; and corroboration might perhaps be obtained of the statement of Jánráv, witness No. 14, that when Bábáji was trying to change the note in the bazár, "Rámswámi was in his carriage on the road. Bábáji got into it, and went away." If this circumstance were established, it would, to a certain extent, be evidence to connect Rámswámi with the possession of the note. I would return the proceedings, marking those portions which are open to objection, and order a new trial.

WARDEN, J.:—I have already, in the case of *Fattechand bin Vastáchand* and three others, recorded my opinion as to the course to be adopted when an appeal is preferred to the High Court, on the ground that there has been a misdirection by the Judge, or an omission to give proper advice to the jury. The question of the improper admission of evidence, as my Hon'ble Colleague has just stated, was not taken into consideration in that case, or in the case of *Elahee Baksh* in the Calcutta Weekly Reporter; but I fully concur with him it should be dealt with on the same principles. Acting on this view, I was prepared to go into the evidence, for the purpose of determining whether, after putting on one side the improper evidence admitted by the Judge, viz., the evidence of witnesses Bábáji and Dádu Miyá, there was sufficient evidence to sustain the verdict of the jury; but in deference to the opinion of my Hon'ble Colleague, I have consented, as an exceptional instance, to direct a new trial; for it is more than probable that by the improper admission of the evidence of the two witnesses, and by the misdirection in connection therewith, the jury may have been greatly influenced in finding a verdict of guilty against the accused.

Conviction and sentence annulled, and new trial ordered.

1869.
AUG. 20.

REG. v. MUHAMMAD KHA'N valad IMA'M KHA'N.

Sanction of Court to prosecute—Criminal Procedure Code, Sec. 169.

Where the Magistrate, before whom a witness gives false evidence, himself commits such witness for trial, his sanction of the prosecution, under Sec. 169 of the Criminal Procedure Code, will be implied.

THE prisoner was tried on the 18th of May 1869 by A. L. Spens, Acting Session Judge of Canárá, on a charge, under Sec. 193 of the Indian Penal Code of intentionally giving false evidence in a judicial proceeding, and, having been found guilty, was sentenced to two years' rigorous imprisonment.

No formal sanction (under Sec. 169 of the Criminal Procedure Code) for the prosecution was recorded; but the false evidence was given by the prisoner before the committing Magistrate in a case tried by him.

The prisoner appealed to the High Court, and the appeal was heard by WARDEN and LLOYD, JJ.

Shántárám Náráyaṇ for the prisoner:—The prosecution is not legal. There is no authority for saying that, where the committing Magistrate is the person before whom the false evidence has been given, it is not necessary to record a previous sanction to the institution of criminal proceedings. That circumstance might be a good ground for concluding that the sanction would have been given; but, in fact, it has not been given as the law requires. This is a matter of jurisdiction, for it is the sanction which gives jurisdiction. Supposing the Criminal Court of the Full-Power Magistrate in this case were the same, but the Magistrate was different, would not a special sanction be necessary?

Dhirajlál Mathurádás for the prosecution:—The prosecution was legal, for the institution of the proceedings by the committing Magistrate implied his sanction. It is not enacted that that sanction must be in writing, or in any particular form. It has been held in Calcutta, where a man made a false charge against another before a District

1869.

REG. v. MUHAMMAD KHA'N valad IMA'N KHA'N.

Magistrate, who, on finding the complaint to be without foundation, directed a subordinate Magistrate to commit the complainant to the Session Court, that the directing order was a sufficient sanction (*a*). In a Bombay case prosecution for non-attendance in obedience to a summons was entertained without the sanction or complaint required by Sec. 16 of the Code of Criminal Procedure; and it was held that there was an implied sanction for the prosecution, as the conviction was by the same Magistrate whose summons was treated with contempt: *Reg.* v. *Ganu bin Tátiá* (*b*). The present case is the same in principle.

Cur. adv. vult.

26th August—LLOYD, J.:—There is an implied sanction to the institution of criminal proceedings where the Magistrate before whom the false evidence was given is also the committing Magistrate. As the prisoner did not object to the jurisdiction of the Court when he was put on his trial, it is now too late to take this objection.

WARDEN, J.:—I concur.

Petition rejected.

(*a*) 5 Wyman's Rep. 59. (*b*) 5 Bom. H. C. Rep. Cr. Ca. 38.

REG. v. KA'LA' KA'RSAN, *et al.*

Sept. 16.

Trial with aid of assessors—Omission to state grounds of decision—Error of procedure not prejudicing accused—Crim. Proc. Code, Sec. 379.

In a trial conducted with the aid of assessors the Judge's omission to state the ground of his decision is not an illegality which invalidates the conviction.

THE accused, Kálá Kársan, and seven others were convicted under Sec. 412 of the Indian Penal Code, by C. G. Kemball, Session Judge of Ahmedábád, of the offence of receiving property stolen in the commission of dacoity, knowing it to have been stolen, and sentenced to be transported for life.

The prisoners, Kálá Kársan, Jethá Jassá, Umá Jivá, and Amlusú Bhavá, having appealed from the conviction and sentence, the appeal was argued before WARDEN and LLOYD, JJ.

1869.

REG. v. KA'LA' KA'RSAN, *et al.*

Shaik Amirúddín for the prisoners:—The Session Judge in this case has recorded no reasons for his finding. This was a trial with the aid of assessors, and the Judge differed from the assessors in his finding on the charge. Sec. 379 of the Criminal Procedure Code requires that in trials not by jury the ground of the Judge's decision shall be recorded. The words are imperative, and failure to comply with the requisition is not a mere irregularity, it is an illegality which vitiates the finding. Though there are no decided cases on this portion of the section, there are decisions upon the former portion of it which refers to trials by jury, enacting that the Judge *shall* sum up the evidence to the jury. Upon that it was held that when a Judge did not sum up the evidence, or there was a defect in his summing up of the evidence, such omission was an illegality which invalidated the conviction: *Queen* v. *Shumsere Beg* (*a*), *Bhugwán v. Doyal Gope* (*b*).

Dhirajlál Mathurádás in support of the conviction:—Failure to state the reasons for a Judge's finding is only a defect of procedure, and under Sec. 426 no conviction can be set aside for an error or defect that does not prejudice the accused. In several cases decided by Mr. Grant, Judge of Ahmedábád in 1866, some of them involving capital sentences, no reasons were stated for the finding, yet this Court refused to interfere.

PER CURIAM:—We hold that the Judge's omission to record his reasons for judgment was, under the circumstances, an irregularity which did not vitiate the finding.

(*a*) 9 Calc. W. Rep. Cr. R. 51. (*b*) 10 Ibid. 7.

REG. v. GANU' bin DHA'ROJI', *et al.*

1869. Sept. 22.

Accomplice—Corroboration—Practice.

Held, that where the evidence of an accomplice is uncorroborated, the correct practice requires Session Judges not merely to tell the jury that it is *unusual* to convict on such evidence, but that he should also tell them that it is *unsafe,* and *contrary both to prudence and practice* to do so: yet that his omission to state this does not amount to an error in law.

Reg. v. *Imám,* 3 Bom. H. C. Rep., Cr. Ca. 57 commented on.

THE prisoners were tried before F. Lloyd, Session Judge of Puṇa, and a jury, on a charge of murder, and, having been convicted, were sentenced to transportation for life.

From the convictions and sentences the prisoners appealed to the High Court.

On the 8th of September 1869 the appeal was argued before GIBBS and MELVILL, JJ.

Macpherson (with him *Gaṇesh Hari Patvardhan*) for the accused.

Dhirajlál Mathurádás (Government Prosecutor) in support of the conviction.

Cur. adv. vult.

On the 22nd of September 1869 the judgment of the Court was delivered by

GIBBS J:—It has been urged upon us by the learned counsel for the appellants that the Session Judge did not impress upon the jury in sufficiently strong terms that they ought not to convict on the uncorroborated evidence of an accomplice, and that his omission to do this constitutes an error in law.

The portion of the Session Judge's charge which is referred to, is as follows:—

"Now the direct evidence is that of the witness Márotí, who comes before this Court as a pardoned accomplice, and therefore as an infamous witness; the evidence of such a man must, under any circumstances, be received with the greatest caution; and though his evidence as an accomplice, if you

1869.

REG. v. GANU'bin DHA'ROJI', *et al.*

feel satisfied that it is worthy of perfect credence, would be sufficient to sustain the charge, and your verdict founded thereon would be legal, it is the duty of a Judge to warn a jury that it is unusual to convict on such evidence, without corroboration in material points."

It is contended that it was not sufficient to tell the jury that it is *unusual* to convict on the uncorroborated evidence of an accomplice, and that they should have been directed not to convict, or at least told that it is unsafe, and contrary both to prudence and practice, to convict on such evidence. In support of this view the case of *Regina* v. *Imám valad Bában* (*a*) has been cited, in which the judgment of the Court (COUCH, C. J., and WARDEN, J.,) contains the following passage:—

"In *Reg.* v. *Stubbs* (*b*), Jervis, Chief Justice, says: 'My practice in a case like the present is to tell the jury that, in my opinion, where an accomplice speaks as to three prisoners, and is confirmed only as to two of them, it is safer to require confirmation as to all three, as nothing is more easy than for an accomplice to put the third man in his own place; and that prudence and practice, therefore, require confirmation as to all the prisoners.' And Parke, B., says, 'Throughout the whole of my experience I have uniformly laid down the rule to be as stated by the Chief Justice. It is competent to the jury to find prisoners guilty upon the unsupported evidence of an accomplice, but Judges have always told juries to require confirmation before they do so. Some Judges think that if there is confirmation as to one prisoner that is sufficient. My practice is different, and I tell juries not to find prisoners guilty, unless the accomplice's evidence is confirmed, not only as to facts, but also as to identity.' Wightman and Cresswell, JJ., concurred.

"'This may now be taken to be the established practice in England, and it would certainly be unsafe to depart from it in India."

(*a*) 3 Bom. H. C. Rep., Cr. Ca. 57.
(*b*) 25 Law J. Mag. Ca. 16; S. C. Dear. Cr. Ca. 55.

This judgment certainly supports the proposition that the Session Judge ought in the present case to have gone further than he did in simply telling the jury that it was unusual to convict on the unsupported testimony of an accomplice; but it does not follow that his omission to do so amounted to an error in law. On the contrary, on referring to the case of *Regina* v. *Stubbs*, we find that the Judges, while stating what they considered to be the proper practice, unanimously decided that an omission to follow such practice did not constitute an error in law. The Court was sitting as a Court of Criminal Appeal, with power to entertain an appeal on the ground of an error in law only; and the ground of appeal was that there had been a misdirection by the chairman of a Court of Quarter Sessions. Thus the circumstances of the case were in every respect similar to those of the present case. Jervis, C. J., said: "We cannot interfere, though we may regret the result that has been arrived at, for it is contrary to the ordinary practice. Willes, J., said: "This is not a question of law, but of practice, and questions of law only can be reserved for our opinion."

Thus the case of *Regina* v. *Stubbs* so far from supporting the contention of the learned counsel for the appellant in this case, is, on the contrary, directly opposed to it.

We must hold that no error in law has been shown in this case. We may mention that we have consulted the learned Chief Justice as to the effect of his judgment in the case of *Regina* v. *Imám*, and that he is of opinion that it is not opposed to the decision which we now pronounce.

Petition rejected.

1869. Sept. 27.

REG. v. JAILÍ BHÁVIN.

Dedication to temple—Minor girl—Shej ceremony—Disposing of minor girl for purposes of prostitution—Ind. Pen. Code, Sec. 372.

Held, that the dedication of a minor girl under the age of 16 years to the service of a Hindú temple, by the performance of the *shej* ceremony, where it was shown that it was almost invariably the case that girls so dedicated led a life of prostitution, was a disposing of such minor, knowing it to be likely that she would be used for the purpose of prostitution, within the meaning of Sec. 372 of the Indian Penal Code.

THE appellant in this case was, with five others, under Sec. 372 of the Indian Penal Code, convicted on the 10th of May 1869, by R. H. Hunter, Session Judge at Ratnágíri, and sentenced to suffer one day's simple imprisonment and to pay a fine of one hundred rupees, for having disposed of a minor girl, named Súndri, knowing it to be likely that such minor would be employed or used for the purpose of prostitution.

The facts of the case appear from the judgment of the Session Judge:

"It appears that about seven or eight years ago a Bhandári prostitute gave birth to a girl, and not knowing how to support the child, took it to Jailí (prisoner No. 1), who has ever since maintained the child, and apparently adopted her as her own daughter. About the 20th of February last she performed the *shej* ceremony upon the girl. This *shej* ceremony is described to be a kind of marriage ceremony in the Bhávin caste, to which Jailí belongs, whereby the girl becomes devoted for life to the temple in which the ceremony is performed. This custom is confined to the Malwán táluká, and Sawantwari and Goa territories. It is thus described by one of the witnesses: 'A *khangira*, or knife, is put on the ground before the idol, and the girl who is to undergo the ceremony puts a garland on the knife, her mother then puts rice on the girl's forehead, and the officiating priest then weds the girl to the knife, just as if he were to unite her to a boy in marriage, by reciting the *mantrás*, while a curtain is held between the girl and the knife.' The girl thus becomes a Bhávin, and dedicated to the service of

the temple, and cannot marry again, and subsists generally by prostitution after attaining maturity. Although there is nothing in this dedication to the service of *Devi* (from which the word Bhávin is supposed to be derived) incompatible with innocence, there is no doubt, from current phrases in the language, that the popular notion about the loose life of the Bhávin is entirely in accordance with the whole of the evidence recorded in this case, that Bhávins are commonly prostitutes. No doubt their name has arisen from their creed, and their chief duty is to perform menial services in the temple to which they belong; but the remuneration attached to this service is too small to enable them to subsist without resorting to other occupations, and unfortunately the peculiar circumstances of their position have induced them generally to become prostitutes. It seems that none but Bhávins are allowed to perform certain services in the temple; that alienations of revenue have been continued by the State for the support of these services; that the right to these alienations is inherited by those daughters of a Bhávin who have qualified as Bhávins themselves; and the above described *shej* ceremony is an indispensable qualification.

"It follows that, be the ostensible object what it may, whether it be to train up girls for the performance of the required services, or whether it be to secure for their heirs a share of the property assigned to the temple, directly these Bhávin mothers dedicate their daughters by performing the *shej* ceremony over them they enchain them to an occupation which almost always inevitably leads to a life of prostitution. The evidence, partly consisting of the admissions of the prisoners themselves, establishes this fact so clearly that it may almost be assumed that all who took part in the performance of this ceremony on the girl Súndri must have been well aware that, in all probability, Súndri in course of time, by reason of this dedication, will become a prostitute. The evidence does not suffice to show that Súndri could not have been admitted after she had grown to years of discretion, though there is a general unanimity that this ceremony is performed upon girls between five and ten years

1869.
REG. v. JAILÍ' BHA'VIN.

old. This, however, is important only in estimating the criminality of the offence, for whether adults are competent or not, the law distinctly prohibits a minor from being disposed in any way whatever, with the knowledge that such minor will in all probability, and in consequence of such disposition, be employed for any immoral purpose.

"All the prisoners co-operated with the intention of aiding in the performance of this ceremony, and being present there, are liable as principals, under Sec. 114 of the Code. In passing sentence I bear in mind that though the law has been seven years in operation in this district, it has never yet been apparently enforced; that though the ceremony which has in the minds of those who took part in it operated to consign the child Súndri to a wretched and degraded course of life, yet they who performed it were acting in conformity with a long-established usage, and one which had indirectly received the sanction of the ruling power. It would be hard, therefore, to enforce this first lesson by a penalty of imprisonment. I will therefore award but a nominal imprisonment and a moderate fine, which may suffice to teach these people the wisdom and necessity of abandoning a demoralizing custom."

From the conviction and sentence of the Session Judge Jailí appealed to the High Court.

The appeal was argued before WARDEN and LLOYD, JJ., on the 27th of September 1869.

Shántárám Náráyaṇ for the prisoner:—The only question here is whether the voluntary dedication of a minor girl under the age of sixteen to the service of a temple, and having the *shej* ceremony performed over her, is a disposal of such girl for the purpose of prostitution. It is submitted that it is not. There is nothing in the ceremony itself which is of an immoral nature, and the *purpose* of the ceremony is to enable the girl to perform certain menial offices in the temple, and to entitle her to certain property. It may be that such girls as these usually become prostitutes, and that they are not permitted to marry; but the most that the

appellant can be said to have done is to have placed the girl in a position that will expose her to temptation when she grows up, and the section seems to contemplate only the case of disposing of a girl, knowing that she will become a prostitute under the age of sixteen years. The prior words in the section further show that the words "otherwise disposing of" mean disposing of her to some third person. Here there is no third person to whom the girl is alienated. She is dedicated to the idol, and not sold to the priests. That this is the meaning of the section is conclusively shown by comparing it with the section immediately following, which is as it were the supplement of it. Correlative to the words "whoever sells or lets to hire" in Sec. 372 are the words in Sec. 373 "whoever buys or hires," and correlative to the words "otherwise disposes of" in Sec. 372 are the words in Sec. 373 "otherwise obtains possession of." By the general words of Sec. 372, which are manifestly intended to protect minors against advantage being taken of their youth and inexperience, the Legislature could not have intended covertly to render illegal an act in itself innocent, sanctioned by long usage, recognised by the Government itself in setting apart provision for these girls, and approved by the general religious sentiments of the Hindú community.

There was no giving up of the child in this case. The appellant retained her in her possession.

Dhirajlál Mathurádás (Government Pleader) was heard in support of the conviction.

Cur. adv. vult.

On the 30th September the judgment of the Court was delivered by

LLOYD J.:—The Session Judge in the grounds of his decision has very clearly set forth the circumstances connected with this case, and the facts described by him are undisputed by counsel for the appellant; who has argued that this conviction is not good in law, because a child dedicated to a temple as a Bhávin need not necessarily lead a life of prostitution, and also because the appellant,

1869.
REG. v. JAILÍ BHA'VIN.

Jailí, when dedicating her adopted child Súndri, did not relinquish her own guardianship of the child, and give possession of her to any one else.

According to the language of that section of the Indian Penal Code under which Jailí has been convicted, it is however sufficient, if, when dedicating Súndri to the temple, she knew it to be likely that the child would be used for the purpose of prostitution, and the evidence on this point is far too strong to admit of a doubt; besides which, her own admissions, when under examination before the Magistrate, are a complete bar to any plea of ignorance on that score being set up.

With regard to the second point urged before us, we are of opinion that it is not essential that Jailí should have given up present possession of the child in order to render herself amenable to the law quoted. By her dedication to the temple Súndri was doomed to be a Bhávin, and in all likelihood a prostitute for life, and we hold, therefore, that this was a disposal of the child, which by the law in question is made a penal offence.

Petition rejected.

Sept. 29.

REG. v. NANTAMRA'M UTTAMRA'M.

Public servant—Ind. Penal Code, Sec. 21—Crim. Proc. Code, Sec. 422—Appeal—Review of evidence.

An engineer who receives and pays to others municipal moneys is a public servant within the meaning of Sec. 21, cl. 10 of the Indian Penal Code, although he may not have the power of sanctioning the expenditure of such moneys.

When an Appellate Court, under Sec. 422 of the Code of Criminal Procedure, directs a Court of first instance to take additional evidence, an appeal on the merits to the High Court is not thereby given.

THE prisoner was tried before A. D. Carey, Magistrate, F. P. at Súrat, on a charge framed under Sections 161 and 116 of the Indian Penal Code, of abetting the acceptance by a public servant of a gratification other than legal remuneration in respect of an official act, and being convicted, was sentenced to suffer rigorous imprisonment for one year,

1869.

REG.
v.
NANTAMRA'M
UTTAMRA'M.

and to pay a fine of Rs. 500, or in default to suffer further rigorous imprisonment for the space of four months.

The circumstances of the case are briefly these:—

Edward Jones was employed by the Municipality of Súrat as engineer for their inundation works. He gave contracts for masonry work to the accused, Nantamrám. The latter, in order to induce Jones to pass inferior materials, was alleged to have offered him some jewels.

From the conviction and sentence the accused appealed to the Session Judge, who said that there were two questions to be considered: first, whether the complainant was a public servant within the meaning of section 21 of the Indian Penal Code; and, secondly, whether there was evidence to support the conviction under sections 161 and 116. Upon the first question he found that there were no sufficient *data* before him to enable him to decide it. He therefore directed the Magistrate F. P. to make full inquiry into the appointment and employment of Jones under the Municipality. Upon the second question he remarked that, while he was not prepared to say that if he had been presiding at the trial of the accused he would have convicted the accused of a criminal offence, still, as the accused had been convicted by the Magistrate F. P., he saw no sufficient reason for interfering with his decision on the ground that it was contrary to the weight of evidence. The Session Judge, however, held that the facts, as established before the Magistrate, would only support a conviction under section 165.

As regards the first point, after considering the additional evidence certified by the Magistrate, the Session Judge came to the conclusion that there was no ground for his interference. He, however, mentioned that he came to this conclusion with the less hesitation, as, according to his view of the law, the accused had acquired, by reason of fresh evidence having been taken under the direction of the Session Court, a right of preferring a regular appeal to the High Court. He altered the sentence to one under Sec. 165, and reduced the unexpired sentence of imprisonment to simple imprisonment for a term of one month,

1869.

REG. v. NANTAMBA'M UTTAMBA'M.

directing that if the fine which had been imposed were not paid, the accused should undergo further simple imprisonment for one month.

The case was heard by GIBBS and LLOYD, JJ.

Branson (with him *Nánábhái Haridás*) for the accused:—There are two points for decision in this case. The first is that which was disposed of by the Court (GIBBS and MELVILL, JJ.,) on the 7th of July last, when the record and proceedings were sent for. It is whether the Lower Appellate Court having, under Sec. 422 of the Code of Criminal Procedure, directed new evidence to be taken on the point of Jones being a public servant, and appreciated it itself for the first time, a regular appeal lies to this Court. In the case of *Reg.* v. *Mohesh Chunder* (*a*), the Magistrate having decided a case without examining the witnesses for the defence, the Session Judge, on appeal, ordered the evidence of those witnesses to be taken by the Magistrate. Their depositions were returned to the Session Judge, who proceeded to deal with the case under Sec. 422 of the Code of Criminal Procedure, and confirmed the judgment and sentence passed by the Magistrate. It was held that the judgment of the Session Judge (though in form confirming the Magistrate's judgment and sentence) was in substance an original judgment, and that, under Sec. 408 of the Code, an appeal lay from it to the High Court upon the merits.

GIBBS, J.:—Upon this point we are of opinion that no appeal lies on the merits. The Bengal case was decided upon a construction of Sec. 422, before it was amended by Act VIII. of 1869. The Appellate Court could, under the old law, have passed such judgment, sentence, or order, as to it should have seemed meet. It cannot do so now. It can only "proceed to dispose of the *appeal* in the manner prescribed by Sec. 419," that is to say, it can only alter or reverse the finding or sentence of the Lower Court. We must, however, in this case go into evidence so far as to see whether the facts establish the allegation that Jones is a public servant.

(*a*) 2 Calc. W. Rep. Cr. R. 13.

Then it is contended that he is not a public servant within the meaning of Sec. 21 of the Indian Penal Code. As an employé of the Súrat Municipality he could only have been appointed under Act XXVI. of 1850, or the local rules framed under that Act. The Act speaks of such employés as officers and servants of *the Commissioners*, and there is nothing in those rules which makes them public servants. The illustration under cl. 10 of Sec. 21, says: "A Municipal Commissioner is a public servant." This shows that the servants of a Municipal Commissioner are not public servants. Wherever the Legislature intended to make any class of servants public servants they have done so in definite language. Thus Bombay Act II. of 1865 by Sec. 20, cl. 2, makes persons appointed under that Act public servants; and the Indian Registration Act, 1866, by Sec. 96, makes registration officers public servants. The Legislature has even passed special acts for this purpose. It passed Bombay Act IV. of 1867, Sec. 16, to make halalcores, and Act XXXI. of 1867, Sec. 2, to make railway employés public servants.

He then read the evidence of Mr. Hope and Pándurang Bálkrishna to show that Jones was not an officer whose duty it was *as such officer* to expend money; and contended that the words "to expend" in cl. 10, Sec. 21 of the Penal Code meant "to expend on his own responsibility."

Scoble (with him *Dhirajlál Mathurádás*, Government Pleader) in support of the conviction:—The intention of the Legislature in enacting specific provisions for making certain important classes of persons public servants was to prevent all dispute; but this does not make these provisions, which are merely declaratory, restrictive. The distinction attempted to be drawn between public servants and municipal servants cannot be supported. If Jones were a private servant of the Municipal Commissioners that might be different; but he is employed on some of their public works.

Evidence was read to show that it was the duty of Jones to receive and expend money, and that he did, as a matter of fact, receive and expend money.

1869.

REG. v. NANTAMRAM UTTAMRA'M

GIBBS, J.:—In this case we are called upon to exercise what is commonly called the extraordinary jurisdiction of the Court, viz., to see whether an error in law does not exist in the conviction. The accused was convicted by Mr. Carey, Magistrate F. P. at Súrat, under Secs. 161 and 116 of the Indian Penal Code, of abetting the acceptance by a public servant of certain valuable property. The conviction was altered by the Session Judge on appeal to one under Secs. 165 and 116, as he was of opinion that the mere offer of jewels by a contractor to the person whose duty it was to pass his works was an offence coming more properly under those sections. The Session Judge, even after the additional evidence, had, apparently, doubts as to whether Jones was a public servant within the meaning of the Penal Code, for there is a want of clearness in the conclusion at which he arrived, he says: "Therefore, as the Magistrate has found that the complainant, Mr. Jones, was a public servant, and as in the further inquiry the Magistrate and President of the Municipality—than whom there could not be a better authority on the subject—has deposed that it was the duty of Mr. Jones to expend municipal money, I think there is no ground for my interference." Indefinite as this is, we must look upon it as a finding that Jones was a public servant, as otherwise he could not have held the conviction under Sec. 165 good. It has been argued before us that this finding is not borne out by the evidence. Mr. Hope, on being asked whether authority to expend municipal money had at any time been given to Jones, says: "Under the resolution A, in connection with others, he could, under certain circumstances; and as a matter of fact the circumstances did occur, and he did exercise the authority. The other resolutions I refer to are those marked B and C in the minute book. By these resolutions the Municipality granted Rs. 50,000 for inundation works. That money was placed at my disposal to spend, and I directed Mr. Jones to prepare estimates, and to give contracts on my general approval of the projects; and in accordance with resolution marked D, I gave Mr. Jones certain directions. Mr. Jones at the end of every month used to send me bills of

the amount of work which he had had done, which I noted 'admissible,' and sent to the Municipal Secretary." Without, therefore, deciding that a person on whose signature public money is paid may not be said to "expend it," a view I am personally prepared to hold, it seems to us in the present case, upon the evidence of Jones, corroborated as it has been by Mr. Hope, that Jones did in fact receive municipal money, and pay the same to the contractors; and we are of opinion that this is sufficient to bring him within the 10th clause of Sec. 21 of the Indian Penal Code. We see therefore no ground to exercise the extraordinary powers of the Court in this case.

Petition rejected.

SHANKAR ABA'JI' HOSHING .....*Petitioner.*

Oct. 6.

Subordinate Magistrate of Second Class—Entertaining case on report of Police Officer—Crim. Proc. Code, Sec. 66 A—Transfer of case from one Magistrate's Court to another.

A Subordinate Magistrate, 2nd Class, who is not specially vested with powers under Sec. 66 A of the amended Code of Criminal Procedure, has no jurisdiction to try a case on the report of a Police Officer, or on a complaint directly preferred to him.

The High Court will not, except on very strong and very clear grounds, transfer a case from one Magistrate's Court to that of another Magistrate.

THIS was an application for the transfer of a case from the Magistrate's Court in which it was pending to another Court.

Macpherson (with him *Shántárám Náráyaṇ*) in support of the application.

Dhirajlál Mathurádás contra.

Cur. adv. vult.

The facts appear from the judgment of the Court (GIBBS and MELVILL, JJ.,) delivered by

GIBBS, J.:—In this case the petitioner applies for the transfer of a criminal case now pending against him in the Court of the Subordinate Magistrate 2nd Class, of Wái, to some other Court in the district of Satárá. The petitioner

1869.
SHANKAR ABA'JI' HOSHING.

filed an affidavit, and, on grounds shown by his counsel, the record and proceedings were called for by another Division Bench of this Court, and the matter now comes before us for final disposal. In the affidavit it is stated that a courtezan, with whom the applicant had been acquainted for ten or twelve years, had died of cholera at Wái, and left a will appointing him executor, and disposing of her property in trust for her mother, and for religious and charitable purposes; that one Krishṇá Joshi Panchnadikar complained to the Subordinate Magistrate that the said courtezan had died heirless, and that the petitioner was appropriating her property; that during the investigation of this complaint the Subordinate Magistrate, in consequence of a grudge against the petitioner, instigated, in open Court, the mother and brother of the deceased courtezan to deny the will, and institute criminal proceedings against him for trespassing on the property; that, in pursuance of this instigation, a complaint was made before the Chief Constable, who being of opinion that no offence had been committed, made a report to that effect to the Subordinate Magistrate. The petitioner further alleged that the Subordinate Magistrate, not satisfied with this, took a complaint himself, and instituting criminal proceedings against the petitioner and his servants, who were stationed to protect the property, conducted the inquiry in a manner which indicated that he had made up his mind to convict. Six applications were made to the Magistrate of the District for a transfer of the case, but it was stated that no attention was paid to them.

Upon this affidavit the High Court sent for the proceedings, and directed the Magistrate of the District and the Subordinate Magistrate 2nd Class, to report on the allegations made by the petitioner. On receipt of the writ the District Magistrate deputed Mr. Trevor, the Magistrate in charge of táluká Wái, to proceed there, and make a personal inquiry into the matter. This was done, and Mr. Trevor has sent in a very lengthy and clear report, which has been forwarded to us by the District Magistrate with his own observations.

1869.
SHANKAR ABAJI HOSHING.

Now, the reasons assigned by the petitioner for asking this Court to give the order for transfer, as gathered from his petition, are, that the Magistrate instigated the complaint; that he "conducted himself in a manner that shows that he had made up his mind to disgrace petitioner;" that he placed an armed guard over the accused; that he browbeat the witnesses; and, finally, that "petitioner is apprehensive that he will not have justice done him if the case remains in the hands of the said Subordinate Magistrate."

From the proceedings it appears that the inquiry has been completed, and a finding recorded against two of the accused; and that the reason why it has not been completed against the petitioner is that he absented himself on a medical certificate as being unable to be present in Court at Wái, although he appears to have been well enough to travel to Bombay, and apply to this Court for a transfer of the case.

This Court will always require some very strong grounds for interfering in the manner sought for by the petitioner. To move a case from one Magistrate to another on grounds personal to such Magistrate is tantamount to a severe censure on such officer, and the very clearest grounds must exist ere the Court will interfere.

We have to see whether any such grounds have been established by the petitioner in this case. Mr. Trevor, the F. P. Magistrate in charge of the táluká of Wái, has made a very careful and full report, and although, from passages which occur from time to time, clearly not trying in any way to screen his subordinate, he concludes as follows:—

"The Subordinate Magistrate is, as you are aware, a man of somewhat brusque manner and independent character; and his disposition to resent rudely anything which seems to him like officious interference has led him into quarrels with several influential people, more especially with the proprietors of the *Maharástra Mitra* and *Indu Prakásh*. The latter reside at Wái; and one of them, I may observe, was security for the petitioner at his trial. Under these circumstances it is extremely likely that the Subordinate Magis-

1869.

SHANKAR ABA'JI' HOSHING.

trate may have been led into vindicating the dignity of his Court and his own independence and impartiality somewhat more ostentatiously than was necessary; and from all I heard at Wái.I am inclined to believe that this may have been the case, even to the extent of setting an armed guard, which, as a rule, is only done in trials for offences accompanied by violence, and not always then.

"The proceedings were, however, conducted with too much publicity, and the probability that they would be brought to the notice of higher authority became apparent at too early a stage, to make it at all likely that the petitioner had any reason to fear wilful or substantial injustice." Now, this shows that the Subordinate Magistrate is an active and energetic officer, perhaps rather over-zealous, but nothing more.

The District Magistrate, in forwarding this report, gives as his own opinion of the officer as follows:—"I have known the Subordinate Magistrate for the last four years and a-half, and I have full reliance on his integrity and uprightness, though he is perhaps sometimes a little hasty and injudicious."

Taking these reports in the most unfavourable light, they would only, perhaps, raise the question whether the Subordinate Magistrate was an officer too hasty and injudicious to exercise magisterial powers at all (a meaning we in no way intend placing upon them); but they in no way prove the petitioner's allegations. We have had frequent opportunity of knowing officially that party spirit runs high in the town of Wái, and that upright and energetic officers, whether exercising civil or criminal functions, are apt to be petitioned against; but after the very full inquiry which has been made in this case, we feel sure that we should not be justified in ordering a transfer of the case as prayed for, on the grounds urged by the petitioner.

We think, however, there is a fatal objection, which was not raised at the bar, to the trial of the case by the Subordinate Magistrate 2nd Class, a matter which has

1869.

SHANKAR ABA'JI' HOSHING.

been referred to the Court by several Magistrates, and which is one arising from the late Act amending the Criminal Procedure Code, Sec. 66 A. of which is as follows:—"The Local Government may, by notification in the official *Gazette*, define what Magistrates or Subordinate Magistrates shall entertain cases either on complaint preferred directly to themselves or on the report of a Police Officer; and such Magistrates or Subordinate Magistrates shall be competent to entertain such cases, if the offence charged is triable by them, or if they shall have been empowered under Section 38." Now, we find that Government have issued a proclamation under this section in the *Government Gazette* of 15th July 1869, by which they only extend the powers to Magistrates F. P. and 1st Class Subordinate Magistrates, and do not include 2nd Class Subordinate Magistrates; and, further, to show they did not intend to include these latter officers, the second para. of the notification informs Magistrates of Districts that, should they think it necessary to confer these powers on any 2nd Class Subordinate Magistrate, they are specially to apply to Government.

Sec. 66 A. came into operation on the 1st of June last, prior to the commencement of these proceedings; and therefore the 2nd Class Subordinate Magistrate had no power of his own motion to inquire into the matter; and as there is nothing to show that the complaint was referred to him by the District Magistrate, it follows that the proceedings are illegal. We must therefore annul them, and leave the Police Officer's report to be dealt with by the Magistrate having jurisdiction.

Proceedings annulled.

NOTE.—On the subject of the powers of Subordinate Magistrates to hear cases on complaint preferred directly or on the report of a Police Officer, see, further, a "Notification" published in the *Government Gazette* of 11th November 1869.—ED.

1869.
Dec. 1.

REG. v. KESHAVSHET, *et al.*

Magistrate F. P.—Magistrate of the District—Court of Session—Reference to the High Court—Crim. Proc. Code (Amended), Secs. 23 G. and 434.

Held, that under the provisions of Section 23 G. of the Code of Criminal Procedure, a Magistrate F. P. is, for the purposes of Section 434, immediately subordinate to the Magistrate of the District, and not to the Court of Session.

ONE Bálshet bin Náráyaṇshet, in a petition to the Session Judge of Ratnágirí, stated that he had complained to the Magistrate F. P. that his wife had been enticed away by the accused, and that that officer, without reducing his complaint to writing, refused to issue a summons. Mr. Lyon, Acting Session Judge, thereupon made the following order:—

"This is an application under Sections 434 and 435 of the Criminal Procedure Code. The offence in regard to which the application is made appears to be under Section 498 of the Indian Penal Code, which is specified in the seventh column of the schedule annexed to the Criminal Procedure Code as triable by the Magistrate of the District. In order to give this Court jurisdiction the offence must be specified as triable by the Court of Session, or as triable by the Court of Session or Magistrate of the District; and this not being the case, the Court has no jurisdiction under Section 435.

"In order to give the jurisdiction under Section 434, it is necessary that there should be some irregularity in the proceedings of the subordinate Court; and that that Court should be immediately subordinate to the Session Court. In this case an irregularity has been committed. The provisions of Section 66 of the Procedure Code have not been complied with. No examination of the complainant appears to have been made, nor has any such been committed to writing. The Magistrate F. P. appears to be immediately subordinate to the Session Court. As I am of opinion that by reason of the above irregularity in the proceeding the order of the Magistrate F. P. refusing to issue a summons is contrary to law, it is ordered, under the provisions of Section 434 of the Code, that the proceedings be referred for the orders of the High Court."

The proceedings were accordingly referred to the High Court.

1869.
REG. v. KESHAVSHET, et al.

PER CURIAM (GIBBS and MELVILL, JJ.):—The Court is of opinion that, under the provisions of Section 23 G. of the Code of Criminal Procedure, a Magistrate F. P. is, for the purposes of Section 434, immediately subordinate to the Magistrate of the District, and not to the Court of Session. The Acting Session Judge, therefore, had no authority to call for or to refer these proceedings, and the Court can make no order on the reference.

No order.

REG v. BHA'ISHANKAR NARBHERA'M.

Dec. 2.

Inquest Report—Evidence—Reg. XII. of 1827, *Sec.* 52.

Reg. XII. of 1827, Sec. 52, having been repealed by (Bombay) Act VIII. of 1867, an inquest report is not admissible in evidence.

IN this case the record and proceedings were sent up to the High Court for confirmation of the sentence of death passed by C. G. Kemball, Session Judge of Súrat, upon the prisoner, who was tried and convicted of the offence of culpable homicide amounting to murder.

The Court (GIBBS and MELVILL, JJ.,) made the following order:—

The Court confirms the sentence of death passed upon the prisoner, Bháishankar Narbherám. The Session Judge should be informed that Reg. XII. of 1827, Sec. 52, having been repealed by Bombay Act VIII. of 1867, the inquest report was not admissible in evidence, and should not have been recorded as such.

1869.
Dec. 11.

REG. v. GOVINDA'S HARIDA'S.

Charge—Amendment of charge—Prisoner prejudiced on merits—Act XVIII. of 1862, *Sec.* 1.

The Court, under Sec. 1 of the Criminal Law Amendment Act (XVIII. of 1862), has power to order the amendment of a charge involving a change in the ownership of stolen property, provided such amendment does not prejudice the accused in his defence upon the merits.

Where it is doubtful whether an amendment of a charge will or will not prejudice the accused in his defence upon the merits, the amendment ought not to be made.

Where the accused was charged with receiving stolen goods from the wife of the prosecutor, the property in the goods being laid in the prosecutor, and the charges were amended by laying the property in the prosecutor jointly with his mother, it was held that such amendment ought notto have been made.

AT the fifth Criminal Sessions of 1869, before WESTROPP, J., and a common jury, the prisoner was charged: (1) "with having on the 10th of September 1869, in a certain building used as a human dwelling, committed theft of one gold nose-ring, three gold finger-rings, one silver waist-chain, and Rs. 150 in money, of the moveable property of Bim Javhára against the form, &c.; (2) with having dishonestly received certain stolen property, (to wit) one gold nose-ring, &c., of the moveable property of the said Bim Javhára, he, the said prisoner, having reason to believe the same to be stolen property against the form, &c.; (3) with having dishonestly misappropriated and converted to his own use certain property, (to wit) one gold nose-ring, &c., of the moveable property of the said Bim Javhára, against the form, &c.

Ferguson for the prosecution.

Barton for the defence.

The prosecutor, Bim Javhára, stated that he was a begging Bráhman, living, at a place called Chunam Kiln, with his wife and mother, and that the prisoner was also a beggar. The prosecutor kept the ornaments and money in question in a box in his house, where he saw them the day before they were stolen. Of this box sometimes he, sometimes his mother, kept the key. The property in the box was the

joint property of himself and his mother, Gavrábái. They purchased the property with money obtained by begging. The property was purchased out of their joint funds.

On this evidence being given, *Ferguson* applied to the Court to allow the charges to be amended, by inserting the name of the mother of the prosecutor as joint owner with him of the property. WESTROPP, J., allowed the amendment to be made, but expressed doubt as to his authorityto make it, and as to its being possible to do so without prejudice to the defence; and he accordingly reserved the question for the Full Court, whether, under the special circumstances of this case, it was proper to make such an amendment. The case then proceeded, when it appeared that on the day the property was taken, the prosecutor and his mother were absent at a fair begging; that the wife of the prosecutor was left at home; and the prosecutor upon his return found the box open, and the property it contained gone. Rádhá, the wife of the prosecutor, a young woman about 15 years old, stated that she had known the prisoner for about three months; that on the day in question he came to her room, and asked her to take the property out of the box, and go with him to Nassick; that she refused; that he then told her to stand outside, when he would open the box, and she did so; the prisoner opened the box, and took the property, and subsequently gave Rádhá Rs. 4, and told her to go to the railway-station at Byculla, and promised to follow her. Rádhá did so, and waited four hours at the railway-station, and when the prisoner did not come, returned home crying. She further stated that the prisoner threatened her. Another witness, however, Jamnádás Jallú, said that he saw Rádhá give the prisoner a white bag full of something, but did not know what it contained, and heard her say to the prisoner "burn this bag."

The prisoner on the same day took the property, and deposited it with four different persons, to keep for him, but did not meet Rádhá at the railway-station.

The jury found the prisoner guilty upon the second head of charge.

1869.

REG. v. GOVINDA'S HARIDA'S

The point reserved came on for argument before COUCH C.J., and WESTROPP, J., on the 11th December 1869.

Barton, who appeared as *amicus curiæ*, stated that the defence he had been instructed to put forward was that the prisoner had received the property from the wife of the prosecutor innocently, and that, as the wife could not be convicted of stealing the property of her husband, the prisoner could not be convicted of receiving that property from her, knowing it to have been stolen; that by the amendment his line of defence was necessarily altered, and that the prisoner was consequently prejudiced in his defence upon the merits.

Ferguson, in support of the conviction:—The Court had power to make the amendment. The Acts that regulated the procedure in criminal trials in the High Courts in India before Act XVI. of 1852 were Act IX. of Geo. IV., c. 74, and Act XXXI. of 1838. Both of these Acts are silent as to the power of the Courts to allow amendments in indictments. In England, before the passing of Lord Campbell's Act, 14 and 15 Vict., c. 100, the Courts had a very limited power of making amendments, and it was found that criminals often escaped in consequence. It was determined therefore to enlarge the power of the Courts in that respect. The preamble to 14 and 15 Vict., c. 100, runs thus:—"whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and whereas such technical strictness may safely be relaxed in many instances, and whereas a failure of justice often takes place on trials by reason of variances between the statement in the indictment and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence." Sec. 1 then enumerates the amendments that may be made, amongst which is mentioned an amendment in the ownership of any property named or described in the indictment. That Act was passed in 1851.

In 1852 the Indian Act was passed, and the preamble of it is almost identical with that of Lord Campbell's Act. The enacting section, however, does not enumerate the amendments that may be made; but enacts generally that "whenever there shall appear to be any variance between the statement in the indictment and the evidence it shall be lawful for the Court, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence upon the merits, to order the indictment to be amended." Reading this section by the light afforded by Section 1 of Lord Campbell's Act, it is evident that the Court had power under it to order an amendment in the ownership of stolen property. The words of Sec. 1 of Act XVIII. of 1862, under which the amendment in this case was made, are at least as wide as those of Sec. 1 of Act XVI. of 1852, for which it has been substituted.

The prisoner here was not prejudiced in his defence. He would properly have been convicted under the circumstances, even if the prosecutor and his wife were governed by English law: *Reg.* v. *Deer* (*a*). It is immaterial that the adultery had not actually been committed, if there was the intent to elope for the purpose of committing it: *Reg.* v. *Fullarton*, (*b*), *Reg.* v. *Featherstone* (*c*), *Reg.* v. *Thompson* (*d*), *Reg.* v. *Tollett* (*e*). It was differently laid down in *Reg.* v. *Clarke* (*f*); but that case must be taken to be overruled. (COUCH, C.J.:—In ordinary cases when the wife parts with the property of her husband, she is presumed to do so with his consent. That presumption is rebutted in cases of adultery or intended adultery. The husband cannot be presumed to consent to his wife parting with his property under these circumstances, Lord Campbell says, in *Reg.* v. *Featherstone*, that when a woman becomes an adulteress she determines her quality of wife. This is the rule of English law; but even if adultery, or the intention to commit it, were not proved here, the prisoner would have been properly convicted, for the prosecutor is a Hindú, and there is not

(*a*) Leigh and Cave Cr. Ca. 240. (*b*) 6 Cox Cr. Ca. 195.
(*c*) Ibid 376. (*d*) 1 Den. Cr. Ca. 549. (*e*) Car. and Mar. 112
(*f*) 1 Mood. Cr. Ca. 376, *in notis*.

1896.

REG. v. GOVINDA'S HARIDA'S.

between him and his wife that identity of interest which exists between an English husband and his wife: *Reg.* v. *Khatabái* (*g*). That was the case of a Muhammadan, but the rule in the case of Hindús is, I submit, the same. (WESTROPP, J., mentioned a case in the time of Sir Charles Jackson (1854-55), where the Court refused to allow an amendment in the ownership of property.*) It is said that the Court should be sparing in allowing amendments in criminal cases, but the reason of that rule—the objection of the Courts to interfere with the presentment of the Grand Jury upon oath—does not exist here: *Reg.* v. *Hewins* (*h*).

COUCH, C. J.:—The terms of Sec. 1 of Act XVIII. of 1862 are, in my opinion, sufficiently extensive to allow the Court to make such an amendment as was made in this case; they are as extensive as they can well be. The section says that: "Whenever on the trial of any indictment for an offence there shall appear to be a variance between any statement in such indictment and the evidence offered in proof thereof, it shall be lawful for the Court before which the trial shall be heard * * * to order such indictment to be amended according to the proof." The section of the English Act which has been referred to as corresponding with this section enumerates a great variety of amendments which it is lawful for the Court to make, and in my opinion the language of the Indian Act is wide enough to include all those amendments, and possibly goes further than the English Act.

The section in question, however, enacts that the requisite amendment shall be made if the Court shall consider that by the amendment the person indicted will not be prejudiced in his defence on the merits. What we have then to determine is, whether, looking at the nature of the case which was made at the trial against the prisoner, the evidence that was given, and the line of defence set up by him through his counsel, the prisoner has been prejudiced in his defence on the merits; and it appears to me from what I have heard

(*g*) 6 Bom. H. C. Rep. Cr. Ca. 9.
(*h*) 9 Car. and P. 789, per Coleridge J.

* The reporter has not been able to find a report of this case.

during the argument, and from what my brother Westropp has told me, that the amendment may have had such an effect on the line of defence adopted, and that the prisoner may have been prejudiced. If that is possible, or if the case against the prisoner, in consequence of the amendment, has been presented to the jury in a different manner from that in which otherwise it would have been presented to them, I think the amendment ought not to have been made. It is difficult in some cases to say whether an amendment will prejudice a prisoner in his defence upon the merits; in some it is clear that an amendment will not have that effect; in others it is equally clear that it will; and where it is doubtful whether an amendment will or will not prejudice the prisoner, the leaning of the Court should be in favour of the [illegible]oner. In this case, as I have said, the prisoner may have [illegible] prejudiced, and I think the amendment ought not to [illegible]ve been made.

WESTROPP, J.:—I am of the same opinion. I think there is a great deal in what Mr. Ferguson has argued, that the Act of 1862 cannot be considered as giving less power of amendment than the English Act, 14 and 15 Vict., c. 100, and therefore that, generally speaking, an amendment may be made as to the ownership of property. What he has said as to the difference of relation existing between a Muhammadan or Hindú wife and her husband, and an English wife and her husband, may also be deserving of serious consideration. There are cases, even under English law, in which a man can be found guilty of receiving stolen goods which he has taken from the hands of the wife of the owner. But I cannot help thinking that Dr. Barton, the learned Counsel for the prisoner, was embarrassed in his line of defence by the amendment that was made. He thought he had to meet the case of the accused receiving from the wife the property of her husband, in which in all cases, whether English or native, there is more or less of difficulty in procuring a conviction; whereas, it turned out to be the property of the husband and his mother, a fact which did not in any way appear upon the depositions made before the Magistrate

1869.

REG. v. GOVINDA'S HARIDAS.

in the Police Office, and which came, therefore, by surprise as well upon the Counsel for the prisoner as upon the Counsel for the prosecution. Whether, having regard to the very peculiar nature of the evidence given here, the fact of the alteration of the allegation as to the ownership of the property, may not have prejudiced the prisoner in his defence, it is at least very difficult to say; and where there is a doubt on that point, the prisoner is entitled to the benefit of it.

I do not sufficiently recollect the case I alluded to as having occurred before Sir Charles Jackson, to be able to state whether he thought that the accused there would have been prejudiced by the amendment upon the special facts of that case, or whether he went upon the broad ground that any alteration of the statement of ownership would prejudice the prisoner.

COUCH, C. J.:—I think it right to add that there was another course open to the prosecution besides that of asking for an amendment. The prisoner might have been acquitted upon the original charge, and charged anew before the Magistrate according to the facts. There need not have been a failure of justice.

Prisoner discharged.

Digitized with financial assistance from

Government of Maharashtra

on 30 January, 2020